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The Triumph of Hate Speech Regulation: Why Gender Wins but Race Loses in America

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THE TRIUMPH OF HATE SPEECH REGULATION: WHY GENDER WINS BUT RACE LOSES IN AMERICA

*Jon Gould**

I.	SEXUAL HARASSMENT LAW AND CAMPUS SPEECH CODES	• 156
II.	DISPARITY IN JUDICIAL TREATMENT	• 164
	A. <i>Sexual Harassment</i>	• 165
	B. <i>Hate Speech Codes</i>	• 168
III.	TRADITIONAL EXPLANATIONS FOR THE DISPARITY	• 170
	A. <i>Employment vs. Educational Settings</i>	• 170
	B. <i>Special Status of Colleges and Universities</i>	• 178
	C. <i>Universities Overstepping Their Own Policies.</i>	• 183
	D. <i>Conduct vs. Speech</i>	• 186
IV.	SOCIAL AND CULTURAL EXPLANATIONS	• 190
	A. <i>Power of Advocates</i>	• 192
	B. <i>Judges' Ideology</i>	• 196
	C. <i>Limiting Sexuality</i>	• 204
	D. <i>Gender Wins But Race Loses</i>	• 209
	CONCLUSION	• 219

On March 30, 1995, newspaper headlines declared that hate speech regulations were dead.¹ After six years of litigating over university hate speech codes,² Stanford University's rule, one of the most modest and cautiously drafted, had been declared unconstitutional by a California Superior Court.³

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1. See, e.g., *Thought Police Disarmed: Campus Speech Codes R.I.P.*, ARIZ. REPUB., Mar. 30, 1995, at B4 [hereinafter *Thought Police Disarmed*]; *Another Code Bites the Dust*, ROCKY MTN. NEWS, Apr. 7, 1995, at 69A [hereinafter *Another Code*].

2. Throughout this Article I will be referring to "hate speech codes." In truth, I mean university regulations that punish discriminatory conduct, covering speech and/or action. In fact, as will be suggested later, the courts may have labeled regulations as covering speech in order to try to distinguish them from sexual harassment laws.

3. See *Corry v. Stanford Univ.*, No. 740309 (Cal. Super. filed Feb. 27, 1995).

In the wake of the Stanford decision, many commentators rejoiced. Nat Hentoff, a long-time critic of hate speech codes, hailed the end of a doctrine that had suffered from "fundamental weakness[es]."⁴ The *Arizona Republic* delighted that "the First Amendment has been reinstated on America's college campuses,"⁵ and the *Rocky Mountain News* opined that hate speech codes were now "dead letters—unenforced law."⁶

But such celebrating aside, hate speech regulation is far from over. To the contrary, hate speech rules not only continue to exist, but the courts regularly enforce their provisions. The difference is that these cases are largely restricted to a single category—sexual harassment. Under Title VII of the Civil Rights Act of 1964, and with the regulatory support of the Equal Employment Opportunity Commission (EEOC), U.S. courts are willing to penalize those who verbally harass others on the basis of their sex.⁷

That the courts appear to have conflicting approaches to different classes of hate speech begs the question of why this disparity exists. Why is it that courts bristle at university hate speech codes but allow other cases to go forward protecting women from harassing speech?

A logical first step would be to address the various court opinions on the subject, and to be sure many a judge has tried to justify the distinction between hate speech codes and sexual harassment law based on the different environments in which they each arise. This distinction has also caught the attention of several legal scholars, most of whom accept the notion that sexual harassment law can be distinguished from hate speech policies. As a group, they either agree with the courts that the rules of the workplace (sexual harassment) are inapplicable to the classroom (hate speech), or they argue that sexual harassment law should be limited to conduct and that any sort of verbal harassment, no matter its basis or target, violates the First Amendment to the U.S. Constitution.⁸

4. Nat Hentoff, *Against the Odds: A Historic Free Speech Victory*, VILLAGE VOICE, May 2, 1995, at 20.

5. *Thought Police Disarmed*, *supra* note 1, at B4.

6. *Another Code*, *supra* note 1, at 69A.

7. BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 10 (1992).

8. See, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 688 (1997).

This Article challenges those assumptions, arguing that we need to rethink the courts' treatment of sexual harassment law and hate speech codes. Contrary to many commentators, I reject the notion that sexual harassment law is easily distinguished from hate speech codes or that the courts have done an adequate job of explaining their divergent decisions. If anything, the courts have been unusually silent on the question, and those that have considered the issue often leave us with conflicting opinions. Indeed, this riddle is what makes the judicial treatment of hate speech so interesting. Because the courts have been unclear in their justifications, we need to work harder to uncover their true motivations and explanations. This Article tries to do just that, eventually concluding that social and political theories do more to explain the courts' behavior than do jurisprudential answers. One of the Article's major conclusions is that the courts' different treatment of sexual harassment and hate speech stems from their divergent views of gender and racial protection, and ultimately in the American public's conflicting attitudes towards women's and minorities' rights.

In making this argument, the Article is divided into four sections. It begins by comparing collegiate hate speech codes to the hostile work environment test of sexual harassment law. Examining both their textual similarities as well as the historical intentions of their authors, I argue that the two are essentially the same—motivated by similar concerns and addressed to comparable offenses. The Article then moves to the cases themselves. I compare the courts' treatment of collegiate speech policies and sexual harassment law, concluding that the courts have treated similar claims differently; even when cases involve primarily verbal harassment, sexual harassment prevails. By contrast, each of the courts that has considered collegiate hate speech codes has invalidated them as unconstitutional.

Given these divergent decisions, the Article considers whether the courts' purported explanations support their decisions or whether other arguments exist that sufficiently explain the divergence between sexual harassment law and hate speech codes. This is a substantial portion of the Article where I consider four explanations: 1) that rules from the workplace are inapplicable to the academic setting; 2) that "academic freedom" in some way exempts the classroom from rules against verbal harassment; 3) that universities may have overstepped their own hate speech policies; and 4) that sexual harassment law is limited to conduct but that hate speech codes overreach into speech. Ultimately, I conclude that no single argument sufficiently explains the

courts' divergent treatment between the two areas of law. Therefore, the distinction between hate speech codes and sexual harassment law cannot be defended on jurisprudential grounds.

In the second part I propose four other explanations that better depict the courts' behavior. Drawing on several works from political science, I argue that the courts' decisions were a response to unique social and political pressures, and that more particularly, the hate speech decisions were intended as a clear message against certain kinds of cultural change. The explanations are somewhat varied, at times suggesting that courts are responsive to organized pressure groups and the power of public opinion, and at other points arguing that judges may seek to impose their own cultural and social beliefs, whether about gender and minority rights or even public displays of sexuality. However, they each reflect a larger theme of this Article: that the dichotomy between sexual harassment and hate speech cases represents the work of a political institution. This is not the same as saying judges are partisan activists, seeking to impose their ideological agendas much like legislators or executives would do. But to see courts as dispassionate observers sitting on high is to miss the substance of what they do and to ignore the power of their influence. Courts face political pressures, and judges, whether explicitly or not, often make the same type of balancing decisions that politicians confront each day. Indeed, it is their very political nature that best explains the courts' peculiar distinction between sexual harassment law and hate speech codes.

I. SEXUAL HARASSMENT LAW AND CAMPUS SPEECH CODES

While now well established in the law, sexual harassment was not always so widely recognized by the courts. In fact, rather than enjoying direct statutory support, the tort of sexual harassment developed out of the larger doctrine of unfair employment practices. Under Title VII of the Civil Rights Act of 1964, employers are prohibited from "discriminat[ing] against any individual with respect to his . . . conditions or privileges of employment because of such individual's race, color, religion, sex or national origin."⁹ Originally, this language was used to bring suits challenging wages and promotions, but over time courts began to recognize that harassment could become "so severe and

9. 42 U.S.C. § 2000e-2 (1994).

pervasive that it affects the conditions of employment" and thus violates Title VII's prohibition of workplace discrimination.¹⁰

The initial wave of lawsuits under Title VII challenged racial harassment,¹¹ but today both the courts and the EEOC recognize that Title VII supports claims for unfair harassment on the basis of race, sex, religion, or national origin.¹² This is not to say that the caseload is so varied, for the vast majority of harassment claims are those alleging sexual misconduct. In fact, "harassment" today has widely come to mean sexual harassment. The courts have become accustomed to seeing mainly sexual, not racial harassment cases;¹³ and even the EEOC, while noting that harassment cases may cover race and other bases, has drafted regulations dedicated solely to sexual harassment.¹⁴

Sexual harassment has two bases, *quid pro quo* harassment and the creation of a hostile, intimidating, or offensive workplace. The former generally covers sexual advances or requests for sexual favors when presented as a condition of employment. It is hostile workplace harassment, however, that is most relevant to this Article. Not only does it potentially involve the First Amendment, but most university hate speech codes were modeled on its provisions.

The tort of hostile workplace harassment has five elements:

- Verbal or physical conduct of a sexual or sex-based nature;
- That is unwelcome;
- That is directed against an individual because of her (or his) sex;
- That has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment;

10. LINDEMANN & KADUE, *supra* note 7, at 10.

11. The numbers were so great that one commentator has called Title VII's first years "a substantive law on blacks." CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 127 (1979).

12. See LINDEMANN & KADUE, *supra* note 7, at 9. In a footnote to its regulation at 29 C.F.R. § 1604.11 (1998), the EEOC declares that the "principles [of harassment law] continue to apply to race, color, religion or national origin" in addition to sex.

13. See LINDEMANN & KADUE, *supra* note 7, at 9–10, 30–31; Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816–23 (1991).

14. 29 C.F.R. § 1604.11 (1998).

- And that an employer knew or should have known of and did not take adequate action to stop or prevent.¹⁵

When compared to the terms of the hostile work environment doctrine (HWE),¹⁶ campus speech codes look remarkably similar. This resemblance should not be surprising, since many authors of the codes borrowed quite deliberately from the law of sexual harassment.¹⁷ According to one source, 137 colleges and universities adopted speech codes between 1986 and 1991.¹⁸ Although not all were based on HWE, three of the four codes that made it to court had distinct similarities to sexual harassment law. For example, the University of Michigan's policy sanctioned individuals for "discriminatory harassment" if they engaged in:

- Verbal or physical behavior;
- That stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status;
- And that creates an intimidating, hostile, or demeaning environment for educational pursuits, employment, or participation in university-sponsored extracurricular activities.¹⁹

So, too, the University of Wisconsin's discriminatory harassment policy had four elements:²⁰

- Racist or discriminatory comments, epithets, or other expressive behavior;
- Directed at an individual, or on separate occasions at different individuals;

15. 29 C.F.R. § 1604.11 (1998).

16. For the remainder of this paper, the claim of sexual harassment based on a hostile, intimidating, or offensive work environment will be abbreviated as "HWE."

17. See, e.g., Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 89 (Mari J. Matsuda et al. eds., 1993).

18. *Academic Index*, LINGUA FRANCA, Oct. 1991, at 5.

19. Both these terms, and the terms for the University of Wisconsin's code that follows, are paraphrased. For the exact wording of each code, consult *Doe v. University of Michigan*, 721 F. Supp. 852, 856 (E.D. Mich. 1989) and *UWM Post v. Board of Regents*, 774 F. Supp. 1163, 1165-66 (E.D. Wis. 1991).

20. See *Doe*, 721 F. Supp. at 856.

- That intentionally demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age of the individual or individuals;
- And that create an intimidating, hostile, or demeaning environment for education, university-related work, or other university-authorized activity.

When viewed side-by-side like this, collegiate hate speech codes share four essential characteristics with HWE claims. First, both the codes and sexual harassment law were designed to cover protected groups of individuals. Sexual harassment law has usually been applied to protect women, while hate speech codes were expanded to cover race, religion, color, and other identity groupings. Second, both the codes and sexual harassment law covered unwelcome verbal or physical conduct. Although the hate speech codes did not use the term "unwelcome" explicitly, their requirement that the conduct demean or stigmatize another presumes that an attack would be unwelcome. Third, both standards required that an attack be targeted at an individual's protected identity. It would not be enough, for example, that an employee used sexual invectives at work. To trigger sexual harassment law, such epithets would have to be targeted against a woman because of her gender.²¹ Similarly, in the university setting, an epithet would have to be directed against an individual's race, color, or other protected characteristic. Finally, the hate speech codes used the exact same standard as HWE for triggering liability. Although occurring in an educational setting and not just at work, the requirement that conduct create an intimidating, hostile, or demeaning environment for educational pursuits is taken completely from the law of sexual harassment.²²

21. To understand what it means to target a woman "because of her gender" can be difficult. Essentially, this expression means that the harasser singles out his victim because she is female. As cases of same-sex harassment arise, this definition may be broadened. For the purposes of this Article, however, I will consider sexual harassment to mean that a woman receives unwelcome sexual conduct that she would not if she were male.

22. There is one obvious dissimilarity between the codes and HWE. While the former holds individuals directly liable for creating a hostile educational environment, HWE essentially creates vicarious liability against employers for the acts of their employees. Some commentators consider this distinction significant, arguing that speech codes expand liability past anything allowed in the workplace. However, the argument runs the other way. Speech codes actually limit liability, holding liable only those indi-

One reason for the similarities between HWE and speech codes is that both were targeted to the same type of harm. As commentators have noted, the law of HWE was directed against the "kinds of prejudice and stereotyped thinking" that treat women as one-dimensional sex objects.²³ As women have become more equal partners in the workplace and classroom, the consequences of sexual harassment are both personally and professionally debilitating. Recent studies indicate that a clear majority of women experience physical harassment on the job, with nearly two-thirds of women reporting that they have faced verbal harassment at work.²⁴ Nor are these small slights that can simply be sloughed off. Studies have shown that between forty-five and seventy-five percent of sexual harassment victims "experience [an] adverse effect on their work performance."²⁵ Victims "frequently are angry, embarrassed, fearful, and anxious about the incidents. . . . [T]hey feel less trustful, have problems in their . . . work, and develop negative attitudes toward career development."²⁶ In the most severe cases of sexual harassment, victims may suffer headaches, sleeplessness, fatigue, gastrointestinal problems, and appetite loss. Some "experience significant disruption in their relationships with their boyfriends or husbands," and attendance and work or academic performance tends to suffer.²⁷

So, too, the authors of hate speech codes were concerned with the potential damage done to victims of racial or other harassment. Mari Matsuda, one of the prime advocates of hate speech codes, warned that "negative effects of hate messages are real and immediate for the victims."²⁸ Richard Delgado, a colleague of Matsuda and a coauthor of the University of Wisconsin's speech code, describes the potential harms in more detail:

viduals who engage in harassment. By contrast, HWE expands liability past the harasser to his employer.

23. LINDEMANN & KADUE, *supra* note 7, at 8. See also STEPHEN J. MOREWITZ, *SEXUAL HARASSMENT AND SOCIAL CHANGE IN AMERICAN SOCIETY* (1996).

24. In fact, a 1994 survey of 2000 lawyers at twelve large law firms across the nation showed that 91% of the women and only 13% of the men had been subject to verbal harassment within the past year. See Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 403 (1996).

25. Epstein, *supra* note 24, at 404 (citations omitted).

26. MOREWITZ, *supra* note 23, at 253.

27. MOREWITZ, *supra* note 23, at 254.

28. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336 (1989).

The psychological responses to such stigmatization consist of feelings of humiliation, isolation, and self-hatred. . . . [It] injures its victims' relationships with others . . . [and] may also result in mental illness and psychosomatic disease. . . . The psychological injuries severely handicap the victim's pursuit of a career. The person who is timid, withdrawn, bitter, hypertense, or psychotic will almost certainly fare poorly in employment settings. . . . Finally, and perhaps most disturbing, racism and racial labeling have an even greater impact on children than on adults . . . [as] minority children [may come to] exhibit self-hatred because of their color.²⁹

Even the court that ultimately rejected Wisconsin's code acknowledged that "[s]tudies show that victims of discriminatory harassment have experienced physiological symptoms and emotional distress ranging from fear, rapid pulse rate, difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis and suicide."³⁰

If harassment law and speech codes have both similar elements and purposes, it would seem natural that they cover similar fact patterns. Certainly, both claims cover physical harassment, whether touching, groping, graffiti, or acts of sabotage. For example, in the case of *Maturo v. National Graphics, Inc.*, the court found sexual harassment when a co-worker "came up from behind plaintiff, grabbed her arms, and . . . fondled her"³¹ In addition, in *Woods v. Graphic Communications*, the court based a finding of harassment on such actions as "a karate chop" and the scrawling of graffiti near the plaintiff's work space.³²

Similarly, collegiate officials intended their hate speech codes to cover physical acts of harassment. A guide that accompanied the University of Michigan's speech code warned that the provision would extend to "[r]acist graffiti written on the door of an Asian student's study carrel" or distributing "[a] flyer containing racist threats . . . in a residence hall."³³ Officials at the University of Wisconsin disciplined students under their policy for physical harassment. One student impersonated an immigration official and harassed a Turkish-American

29. Delgado, *supra* note 17, at 91-93.

30. *UWM Post v. Board of Regents*, 774 F. Supp. 1163, 1172 n.7 (E.D. Wis. 1991).

31. *Maturo v. Nat'l Graphics, Inc.*, 722 F. Supp. 916, 921 (D. Conn. 1989).

32. *Woods v. Graphic Communications*, 925 F.2d 1195, 1198 (9th Cir. 1991).

33. *Doe v. University of Mich.*, 721 F. Supp. 852, 858 (E.D. Mich. 1989).

student by demanding to see immigration documents.³⁴ Another admitted that ethnic prejudice led him to steal the bank card of his Japanese roommate and illegally withdraw funds from his roommate's account.³⁵

The speech codes also mirror HWE in their application to instances of verbal harassment. The codes of the Universities of Wisconsin and Michigan both state explicitly that they cover "comments" or "verbal behavior," and both were applied to cases of verbal harassment. At the University of Michigan, officials intended the code to cover racist jokes and epithets.³⁶ The University of Wisconsin disciplined students who harassed others with racial insults and ethnic or gendered epithets.³⁷

Such fact patterns are substantially similar to those covered under sexual harassment law, the latter of which may include "gender-baiting," "teasing," or "hazing."³⁸ For example, the court in *Katz v. Dole* upheld a claim of sexual harassment³⁹ where the "harassment took the form of extremely vulgar and offensive sexually related epithets . . . widely recognized as not only improper but as intensely degrading, deriving their power to wound not only from their meaning but also from the 'disgust and violence they express phonetically.'"⁴⁰

The *Katz* court was among the more decorous, refusing to list the degrading words at issue. But, sexual harassment involves words. There are cases in which "cunt" and "pussy" are some of the more pleasant terms used,⁴¹ and others where women "confront their tormenter in front of their manager with, 'You have called me a fucking bitch,' [only to be answered,] 'No, I didn't. I called you a fucking cunt.'"⁴² In fact, the Supreme Court has refused to overturn a case of sexual har-

34. See *UWM Post*, 774 F. Supp. at 1167.

35. See *UWM Post*, 774 F. Supp. at 1168.

36. See *Doe*, 721 F. Supp. at 858.

37. See *UWM Post*, 774 F. Supp. at 1166-68 (cataloging disciplinary actions of harassers including a student who sent a computer message to an Iranian faculty member declaring "Death to All Arabs!! Die Islamic scumbags!" and others who yelled epithets including "piece of shit nigger," "fat-ass nigger," and "fucking cunt" at their classmates).

38. See LINDEMANN & KADUE, *supra* note 7, at 170.

39. *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983).

40. *Katz*, 709 F.2d at 254 (quoting C. MILLER & K. SWIFT, WORDS OF WOMEN 109 (1977)).

41. See, e.g., *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 423 (E.D. Mich. 1984).

42. *McNabb v. Cub Foods*, 352 N.W.2d 378, 381 (Minn. 1984).

assment based largely on "sexual innuendos."⁴³ In *Harris v. Forklift Systems, Inc.*, the company president "often insulted [the employee] because of her gender, . . . [telling her] on several occasions, in the presence of other employees, 'You're a woman, what do you know' and 'We need a man as the rental manager'; at least once, he told her she was 'a dumb ass woman.'"⁴⁴

In response, some courts have gone so far as to require that employers "take prompt action to prevent . . . bigots from expressing their opinions in a way that abuses or offends their co-workers," so as to "inform[] people that the expression of racist or sexist attitudes in public is unacceptable."⁴⁵ Others have banned such inquiries as "[d]id you get any over the weekend?"⁴⁶ As one commentator has noted, cases of HWE may restrict more speech than the hate speech codes ever intended. "Many courts have permitted [sexual] harassment actions to proceed based in part upon offensive speech that was not directed toward the plaintiff."⁴⁷ Others have "permitted [sexual] harassment actions based in part upon speech that was not even witnessed by the plaintiff."⁴⁸ In fact, it was not until 1991 that a defendant raised, and a court ruled on, a First Amendment defense to HWE. In *Robinson v. Jacksonville Shipyards*, the court balanced the "governmental interest in cleansing the workplace of impediments to the equality of women" against the free speech interest in "sexually demeaning remarks and jokes," as well as "pictures of nude and partially nude women in sexually suggestive poses."⁴⁹ Not surprisingly given the terms of this test, the court found the First Amendment defense lacking. Yet *Robinson* is far from an anomaly. As Professor Eugene Volokh has amply chronicled, the courts are quite willing to uphold claims of verbal harassment in the workplace.⁵⁰

43. See *Harris v. Forklift Sys.*, 510 U.S. 17, 19 (1993).

44. *Harris*, 510 U.S. at 19.

45. LINDEMANN & KADUE, *supra* note 7, at 584 (citing *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 3166 (1989)).

46. *Morgan v. Hertz Corp.*, 542 F. Supp. 123, 128 (W.D. Tenn. 1981).

47. Browne, *supra* note 8, at 535.

48. Browne, *supra* note 8, at 535. This point should be remembered by the reader for later sections where this Article considers the courts' conclusion that the speech codes were overbroad. Even these courts acknowledge that the speech codes were applied to face-to-face harassment.

49. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991).

50. Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L.J. 563 (1995).

The same is true for sexual harassment policies created for college campuses. According to a 1994 study of the policies at public universities, 300 of 384 schools had a sexual harassment policy.⁵¹ Almost all of the policies were modeled on the EEOC's regulations, and many took an expansive view of verbal behavior. The University of Iowa's policy, for example, defined "verbal conduct" to cover comments, statements, jokes, questions, anecdotes, and remarks.⁵² Even a policy statement from the American Council on Education suggested that sexual harassment could include "inappropriate put-downs of individual persons."⁵³ Yet with a few isolated examples, the courts have largely refused to restrict or overturn the application of university sexual harassment codes to cases of verbal harassment.⁵⁴ The courts' abstention even led a prominent employment attorney to recommend that schools adopt policies against racial harassment, just as they had done with sexual harassment, or face potential liability from student litigants.⁵⁵

II. DISPARITY IN JUDICIAL TREATMENT

While the terms of collegiate speech codes were substantially similar to those of sexual harassment claims, and while they were directed toward similar harms, the courts have treated them very differently. Sexual harassment is widely recognized by the courts as a valid legal claim. Campus hate speech codes, however, have been ruled unconstitutional.

51. See ARATI R. KORWAR, *WAR OF WORDS: SPEECH CODES AT PUBLIC COLLEGES AND UNIVERSITIES* 35-50 (1994).

52. See *SEXUAL HARASSMENT ON CAMPUS: A LEGAL COMPENDIUM* 179 (Elsa Kircher Cole ed., 1990).

53. *SEXUAL HARASSMENT ON CAMPUS*, *supra* note 52, at 224.

54. See, e.g., *Cohen v. San Bernardino Valley Community College*, 92 F.3d 968 (9th Cir. 1996); *Silva v. University of N.H.*, 888 F. Supp. 293 (D.N.H. 1994).

55. At a 1988 convention of the National Association of College and University Attorneys, Walter B. Connolly, Jr., a Detroit lawyer who specializes in equal employment litigation, advised university counsels to adopt "specific policies for handling incidents of racial harassment, just as many have adopted procedures for dealing with sexual harassment of students and employees." Cheryl M. Fields, *Colleges Advised to Develop Strong Procedures to Deal With Incidents of Racial Harassment*, CHRON. HIGHER ED., July 20, 1988 at A11. According to Connolly, decisions from the federal courts "upheld the idea that employees are entitled to a 'harassment-free work place,' " and in Connolly's view, future cases were likely to extend this right from sexual to racial harassment. *Id.*

A. Sexual Harassment

It has been over twenty years since the federal courts first considered sexual harassment cases. Over that time the lower courts have legitimized the claim. The Supreme Court decided in 1986 that sexual harassment is actionable under Title VII of the Civil Rights Act of 1964 and extends to the creation of a hostile or intimidating work environment.⁵⁶ It is important to remember that the claim of sexual harassment is exclusively a creation of the common law. At no time has Congress passed legislation expressly prohibiting sexual harassment. While the EEOC has issued regulations both defining and prohibiting sexual harassment, the courts have essentially created this doctrine by reading a claim of sexual harassment into the larger area of sex discrimination. At any point the courts might have retreated, and in fact, there were ample legal bases to refuse to create the tort. Judges might have declined to create new law when there was not direct statutory support.⁵⁷ They might have concluded that the terms of the claim, including such requisites as "unwelcome," "hostile," or "intimidating," were too ambiguous to survive judicial scrutiny.⁵⁸ They might have refused to extend the claim to verbal harassment. Or they might have dismissed the underlying theory of sexual harassment on the grounds that it would "chill" relations in the workplace by making coworkers "walk on egg shells."

To be sure, several courts have adopted these positions and refused to recognize sexual harassment claims.⁵⁹ The vast majority of

56. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

57. According to the courts, sexual harassment flows from 42 U.S.C. § 2000e-2, which declares it unlawful for "an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." At no point does this statute explicitly mention sexual harassment. Rather, the courts have read sexual harassment to be sex discrimination "with respect to [an individual's] terms . . . of employment." *Meritor*, 477 U.S. at 63.

58. "A statute is unconstitutionally vague when 'men of common intelligence must necessarily guess at its meaning.' A statute must give adequate warning of the conduct which is to be prohibited and must set out explicit standards for those who apply it." *Doe v. University of Mich.*, 721 F. Supp. 852, 866 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (citations omitted)).

59. *See, e.g., Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986); *Clark v. World Airways, Inc.*, 1980 WL 271 (D.D.C. 1980); *Corne v. Bausch & Lomb*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded*, 562 F.2d 55 (9th Cir. 1977).

federal courts that have heard harassment cases, however, recognize the claim. Indeed, the courts have gone to great lengths to clarify and detail the requirements of a harassment claim. In defining what cases rise to the level of a hostile or intimidating environment, the courts have added the requirement that verbal or physical conduct be "severe" or "pervasive."⁶⁰ The courts have also grappled with the proper standard for evaluating such conduct—whether acts should be viewed "objectively" from the courts' perspective or "subjectively" from that of the victim. The accepted rule, that cases be viewed from the perspective of a reasonable person in the same circumstances of the victim, is again a creation of the courts, as is much of the tort.⁶¹ Time and again the courts have chosen to recognize the claim, even breathing life into its details, when at any time they might have rejected the very theory.

The courts' deference to sexual harassment law is shown most clearly in the case of *R.A.V. v. City of St. Paul*.⁶² There the Supreme Court had the opportunity to consider a municipal hate code: St. Paul, Minnesota's "Bias-Motivated Crime Ordinance."⁶³ Under that ordinance, individuals were prohibited from displaying a symbol "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender. . . ." ⁶⁴ In a somewhat fragmented opinion, the Supreme Court overturned the law on the basis of its "content discrimination." As the Court said, the ordinance was "facially unconstitutional because it imposes special prohibitions on those speakers who express views on the disfavored subjects of 'race, color, creed, religion, or gender.' At the

60. As they iterate, "[t]o affect a 'term, condition or privilege' of employment within the meaning of Title VII, the harassment 'must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."'" *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991) (alteration in original). This test "is a question to be determined with regard to the totality of the circumstances." *Robinson*, 760 F. Supp. at 1523. As another court has said, "[w]hile an isolated incident is not enough, the number of incidents alone is not determinative. . . . Conversely, incidents that are much less severe may constitute harassment in the context of a working atmosphere 'polluted' with" racial tension. *Woods v. Graphic Communications*, 925 F.2d 1195, 1201-02 (9th Cir. 1991) (citations omitted).

61. For a judicial explanation, see *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1271 (7th Cir. 1991).

62. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

63. See *R.A.V.*, 505 U.S. at 379.

64. *R.A.V.*, 505 U.S. at 379 (quoting ST. PAUL, MINN. LEGL., CODE § 292.02 (1990)).

same time, it permits displays containing abuse invective if they are not addressed to those topics."⁶⁵

Under this reasoning, one also might have expected the Court to overturn sexual harassment law. It too "imposes special prohibitions on those speakers who express views on the disfavored subject[] of . . . gender," and as the lower courts have shown, an individual may not hurl sexual invectives at his female coworkers and escape a finding of sexual harassment.⁶⁶ Yet the Supreme Court refused to include sexual harassment claims in its broad prohibition against content discrimination. In fact, the Court went so far as to craft a deliberate exception for sexual harassment, saying such claims really reflect a situation where "a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech."⁶⁷

This exception did not escape the attention of the concurring justices in *R.A.V.* In criticizing the majority's reasoning, Justices White, Blackmun, O'Connor, and Stevens noted that "[u]nder the broad principle the Court uses to decide the present case, hostile work environment claims based on sexual harassment should fail First Amendment review."⁶⁸ Because the Court could not accept that result, the concurrence suggests, it crafted an exception to cover sexual harassment claims.

The Court has been widely criticized for its decision in *R.A.V.*, both for refusing to overturn the claim of verbal harassment on First Amendment grounds,⁶⁹ and for failing to offer the lower courts clear guidance to adjudicate sexual harassment claims when the offending conduct is verbal.⁷⁰ This debate continues unabated, as the Court has still failed to address the constitutionality of verbal harassment claims. In fact, in the term preceding *R.A.V.* the Justices declined "to mention the First Amendment objections to Title VII's harassment law" even though the case under review, *Harris v. Forklift Systems, Inc.*, dealt with

65. *R.A.V.*, 505 U.S. at 378.

66. *R.A.V.*, 505 U.S. at 378. Technically, it is the employer who would be found liable for maintaining a hostile work environment, but it is the behavior of supervisors or coworkers that create the hostile work environment.

67. *R.A.V.*, 505 U.S. at 389.

68. *R.A.V.*, 505 U.S. at 410 (White, J., concurring).

69. See, e.g., Browne, *supra* note 8, at 512-13.

70. See, e.g., Estlund, *supra* note 8, at 705.

misogynist speech.⁷¹ The Court's silence has had a snowball effect on the lower courts; without contrary precedent from the Supreme Court, "most courts adjudicating harassment suits either avoid the issue [of verbal harassment] or assume that the speech allegedly contributing to a hostile environment is unprotected."⁷²

B. Hate Speech Codes

As *R.A.V.* indicates, the courts have not been very receptive to hate speech codes. To date, four cases involving collegiate speech codes have been heard by the courts and each hate speech code has been rejected as unconstitutional. The first code to reach the courts was that of the University of Michigan. In *Doe v. University of Michigan*,⁷³ Judge Avern Cohn overturned Michigan's code, arguing that the rule was both overbroad in its application and ambiguous in its terms.⁷⁴ As the court said,

What the University could not do . . . was to establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed. . . . Looking at the plain language of the Policy, it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct. . . . [T]he terms "stigmatize" and "victimize" are not self defining [and are thus ambiguous]. These words can only be understood with reference to some exogenous value system. What one individual might find victimizing or stigmatizing, another individual might not.⁷⁵

71. See, Estlund, *supra* note 8, at 692. The Court's reluctance is especially notable when one considers that a number of *amici curiae* encouraged the justices to address the First Amendment issues. See Estlund, *supra* note 8, at 692 n.20.

72. Estlund, *supra* note 8, at 709.

73. *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

74. See *id.* at 864-67. Under the constitutional doctrine of overbreadth, "statutes regulating First Amendment activities must be narrowly drawn to address only the specific evil at hand." *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). "A law regulating speech will be deemed overbroad if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate." *NAACP v. Burton*, 371 U.S. 415, 433 (1963).

75. *Doe*, 721 F. Supp. at 863, 867, 859.

A similar ruling came down in *UWM Post v. Board of Regents*,⁷⁶ holding that the University of Wisconsin's speech code was also unconstitutional. Although the judge was more forgiving in determining that most terms of the code were unambiguous, he still ruled that Wisconsin's rule was overbroad. Said the court, the "UW Rule has overbreadth difficulties . . . the terms nevertheless allow the rule to prohibit protected speech. . . . Content-based prohibitions such as that in the UW Rule, however well intended, simply cannot survive the screening which our Constitution demands."⁷⁷

The Michigan and Wisconsin decisions may well have stood as a model for later courts that considered the speech codes of Central Michigan University (CMU) and Stanford University. In *Dambrot v. Central Michigan University*, Judge Robert Cleland overturned a campus rule that prohibited any "verbal . . . behavior that subjects an individual to an intimidating, hostile or offensive educational . . . environment by demeaning or slurring individuals . . . because of their racial or ethnic affiliation."⁷⁸ Borrowing from *Doe*, the court found that CMU's policy was overbroad, vague, and an impermissible viewpoint restriction.⁷⁹

Similarly, in *Corry v. Stanford University*, a Santa Clara Circuit Court threw out Stanford's speech code on the grounds that the University "prohibited certain expressions based on the underlying message."⁸⁰ Although Stanford's code was a little different—in that it prohibited "fighting words"⁸¹—the court's decision followed on that of *Dambrot* and *R.A.V.* Because the speech rule proscribed only those fighting words "based on sex, race, color, and the like," the court held

76. *UWM Post v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991).

77. *UWM Post*, 774 F. Supp. at 1163, 1181.

78. *Dambrot v. Central Mich. Univ.*, 839 F. Supp. 477, 481 (E.D. Mich. 1993).

79. *See Dambrot*, 839 F. Supp. at 482–490.

80. *Corry v. Stanford Univ.*, No. 740309 (Cal. Super. filed Feb. 27, 1995) at 12.

81. Stanford University's rule, entitled "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment," reads as follows:

Speech or other expression constitutes harassment by personal vilification if it: a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and c) makes use of insulting or "fighting" words or non-verbal symbols. <<http://lawschool.stanford.edu/~library/decisions/corrycom.html>>

it to be an "impermissible content-based regulation" prohibited by the First Amendment.⁸²

III. TRADITIONAL EXPLANATIONS FOR THE DISPARITY

Few courts have sought to explain the different treatment between hate speech codes and sexual harassment claims. Both the *Doe* and *UWM Post* courts have considered this question, as has the Ninth Circuit Court of Appeals,⁸³ but judicial explanations seem to stop there. In some sense, that is what makes this inquiry so interesting. Because the courts have not been clear in their justifications, we need to work to uncover the explanation.

As a first step, we need to consider the possibility that there are valid legal bases for the courts' divergence. Again, while the courts have not been especially clear in identifying their reasoning, there are four legal theories the courts might have used to distinguish hate speech codes from HWE claims. Although each may appear reasonable on its surface, I ultimately conclude that none fully explains the courts' behavior.

A. Employment vs. Educational Settings

In *UWM Post*, the University of Wisconsin argued that its speech code was constitutional because its "prohibition of discriminatory speech which creates a hostile environment" paralleled the existing standard under Title VII. However, Judge Robert Warren rejected the University's position, concluding that "Title VII addresses employment, not educational, settings."⁸⁴ While sexual harassment law was constitutional, hate speech codes covered a different environment that was neither included in nor protected by Title VII.

As an initial matter, the judge was correct in describing Title VII's reach. There can be little doubt that the legislation addresses employment settings. 42 U.S.C. § 2000e-2 is entitled "Unlawful Employment Practices," and the Supreme Court made clear in *Meritor Savings Bank*

82. *Corry*, Case No. 740309, at 12.

83. See *Cohen v. San Bernardino Valley Community College*, 92 F.3d 968 (9th Cir. 1996). See *infra* Part III.2 for a more detailed discussion of this case.

84. *UWM Post v. Board of Regents*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991).

v. Vinson that sexual harassment covers "acts of employees for which employers under Title VII are to be held responsible."⁸⁵ Judge Warren was also right that Title VII fails to mention academic life, whether classrooms, residence halls, or extracurricular activities. Statutorily, there is little to suggest that collegiate speech codes would be included in Title VII.

In some sense, however, Judge Warren missed the point. The question is not whether speech codes are authorized by an employment statute. Rather, the issue is whether collegiate speech codes should be found constitutional given that the provision upon which they are based is constitutional. Put another way, if employers may restrict the speech of their employees so as to prevent a hostile work environment, why can't universities regulate the conduct of their members so as to avert a hostile academic environment?

The conventional explanation tells us that speech restrictions are acceptable in the workplace because, unlike college campuses, "the First Amendment has no application" there.⁸⁶ According to this approach, the First Amendment protects "public discourse"—those "communicative processes necessary for the formation of public opinion."⁸⁷ By their very nature, universities are concerned with public discourse, but as the same commentators maintain, "speech in the workplace does not generally constitute public discourse."⁸⁸ "Within the workplace . . . an image of dialogue among autonomous self-governing citizens would be patently out of place."⁸⁹

Yet this view fails to appreciate the expanding role of the workplace in public discourse. "Communication contributing to public opinion is [hardly] limited to the press, handbillers on public streets, and fiery orators in the parks. . . . [F]or most citizens—who are not political activists—the great bulk of their discussion of political and social issues probably occurs in the home and the workplace."⁹⁰ Indeed,

the special import of speech in the workplace is crucially affected by the role of the workplace as an intermediate

85. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

86. Browne, *supra* note 8, at 513.

87. Robert C. Post, *Racist Speech, Democracy & the First Amendment*, 32 WM. & MARY L. REV. 288 (1991).

88. Browne, *supra* note 8, at 515 (discussing *UWM Post*).

89. Post, *supra* note 87, at 289.

90. Browne, *supra* note 8, at 515.

institution in the society. The workplace mediates between individuals and the society as a whole, and it affords a space in which individuals cultivate some of the values, habits, and traits that carry over to their roles as citizens. In the workplace individuals interact with others—initially strangers, often from diverse cultural, ethnic, political and religious backgrounds—in a constructive way toward common aims.⁹¹

If one did not know this passage's source, she might well consider it to be from a college catalogue. And with good reason. Just as the workplace serves as an intermediate institution, so too the college campus brings together young people of varied backgrounds to learn from and with each other. Open dialogue is important in each setting.

Of course, the two differ in important respects. Unlike the college student, an employee is paid to work, not converse. Moreover, the college campus is composed of several settings—classroom, dormitories, open fora—each of which demands different approaches by the First Amendment. Even if we accept the notion that the classroom and workplace share much in common, the Supreme Court has already ruled that a college campus, "at least for its students, possesses many of the characteristics of a public forum."⁹²

These differences, however, need not derail the analysis. Much of this Article considers the courts' treatment of harassment on the shop floor and in the classroom, the two sites that are most comparable. In this respect, both HWE and speech codes seek to prevent the same kind of harassment—speech so serious or pervasive that it interferes with the workplace or classroom. Contrary to those who see speech codes as governing a wider variety of speech, the codes' terms cover only those comments that create a hostile educational environment. Infrequent remarks and obscure criticisms should not trigger the codes, just as similar comments would not invoke Title VII.

Even if we consider other venues on campus, the analysis need not fail. If we move out of the classroom and into the dormitories, civility restraints are even more important. A student's dorm room is her home on campus, and the added privacy she deserves there includes protection against uninvited and offensive harassment.⁹³ Perhaps the

91. Estlund, *supra* note 8, at 727.

92. *Vidmar v. Vincent*, 454 U.S. 263, 268 (1981).

93. As Coleman and Alger add,

only place on campus where speech codes would be inappropriate is the college public square, where students set up tables and soap boxes and debate the finer (and not so fine) points of the day. This I would concede is close to a public forum, a site at which no one need visit or remain. I certainly appreciate the perspective of those who argue a college campus cannot be a true public forum—that because the entire college serves an intermediate function, civility restraints are inappropriate even in the campus square. We need not concern ourselves, however, with this question. None of the college speech codes was applied to speech in the campus square. More importantly, as will be discussed in a later section, most of the courts that overturned the hate speech codes confined their analysis to classroom speech.

But if the workplace shares a quasi-public aspect with college campuses, how do we justify speech restrictions in either setting? In fact, aren't we trying to have it both ways? Under traditional First Amendment jurisprudence, both settings are either private fora, where speech may be more easily regulated, or the two are public sites where speech is presumed to be free and open. How does one justify HWE in this situation, let alone hate speech codes?

The answer, I think, comes from Cynthia Estlund, who herself borrows from Robert Post. To the extent that both the workplace and the college campus produce public discourse, civility restraints are appropriate in each to prevent the type of poisoned attacks that destroy rational deliberation and the "possibility of constructive engagement."⁹⁴ This is not the same thing as advocating content controls, although the two may look similar at times. Civility restraints, instead, are a set of ground rules that say open dialogue rests on an assumption of decorum, that free speech is impossible in an atmosphere of personal attack. As Estlund herself explains:

college dormitories are essentially the temporary private residences of individuals within the microcosm of a society that is a higher education institution. Thus, the educational benefits in this context must by necessity include the benefits typically associated with living in one's own home, including privacy, personal security and safety. Conduct within this realm of interaction must be regulated to the extent necessary to protect these interests.

Arthur L. Coleman & Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J.C. & U.L. 91, 121 (1996).

94. Estlund, *supra* note 8, at 736.

If we understand public discourse as speech that is relevant to the collective process of self-definition and decisionmaking, then civility constraints and the preconditions of rational deliberation seem to belong somewhere within the realm of public discourse. . . . On this view, institutions such as schools and workplaces may be important sites for public discourse, though surely not unbounded critical interaction.⁹⁵

Civility restraints also imply a certain level of equality in both the workplace and classroom. If both sites serve as mediating institutions, it is crucial that no group of workers or students (faculty or staff) receive special preferences or disparate treatment without a valid basis. Against this backdrop, some commentators have argued that the "government's interest in workplace equality stands alone as a justification for punishing some verbal harassment."⁹⁶ As they say, "speech that the speaker knows is offensive," that is directed at an employee because of her sex, and that creates a hostile work environment may be restricted because it devalues the position of women in the workplace.⁹⁷ Again, however, it is entirely unclear why this rationale should not also extend to the classroom. As another commentator admits, "if the workplace context of offensive speech matters only because of the importance of equality in employment, then similar speech restrictions should be accepted in any sphere in which we could discern a strong commitment to equality, such as education"⁹⁸

This distinction between campus and the workplace becomes even more clouded when one considers that universities have borrowed directly from Title VII by applying sexual harassment rules to the academic setting. As mentioned earlier in this Article, 300 of 384 public universities had adopted sexual harassment rules for their campuses as of 1994.⁹⁹ Many policies, like that of the University of Iowa, cover any "verbal . . . conduct of a sexual nature" that creates "an intimidating, hostile or offensive environment for work *or learning*."¹⁰⁰ But Iowa's policy seems to fly in the face of the courts' distinction by

95. Estlund, *supra* note 8, at 714 (citing Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791, 1843-47 (1992)).

96. See Volokh, *supra* note 95, at 1846.

97. See, e.g., Volokh, *supra* note 95, at 1834-47.

98. Estlund, *supra* note 8, at 715.

99. See KORWAR, *supra* note 51, at 34-50.

100. SEXUAL HARASSMENT ON CAMPUS, *supra* note 52, at 179 (emphasis added).

lumping workplace and classroom speech together. If, as the courts maintain, there are different rules for the speech acceptable in the workplace and the classroom, then one would expect harassment policies like Iowa's to fail. However, with two notable exceptions,¹⁰¹ the courts have refused to entertain challenges to university sexual harassment policies. The cases include *McClellan v. Board of Regents*, in which the Supreme Court of Tennessee ruled "[t]here is no meaningful difference . . . between sexual harassment in the workplace and sexual harassment in an academic setting;"¹⁰² *Parks v. Wilson*,¹⁰³ where a district court explained that the "policies underlying [Title VII] support with equal force imposition of the same standard in the school setting;"¹⁰⁴ as well as federal cases in Illinois¹⁰⁵ and Ohio¹⁰⁶ which presumed that students could bring sexual harassment charges under university policies premised on Title VII.

It is not just universities, however, that are leveling the wall between the workplace and the classroom. The courts are doing it themselves by using Title IX to apply sexual harassment standards to academia. Title IX, of course, is federal legislation "designed to protect individuals from sex discrimination by denying federal financial aid to those educational institutions that bear responsibility for sexually discriminatory practices."¹⁰⁷ Title IX provides that: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .¹⁰⁸

At no point does Title IX speak of sexual harassment, nor does it reference terms from Title VII or any other employment-related legislation or regulation. Yet, the "courts have regularly applied Title VII principles" when "reviewing sexual discrimination claims by teachers and other employees of educational institutions under Title IX."¹⁰⁹

101. See *Cohen v. San Bernardino Valley Community College*, 92 F.3d 968 (9th Cir. 1996); *Silva v. University of N.H.*, 888 F. Supp. 293 (D.N.H. 1994).

102. *McClellan v. Board of Regents*, 921 S.W.2d 684, 691 (Tenn. 1996).

103. *Parks v. Wilson*, 872 F.Supp. 1467 (D.S.C. 1995).

104. *Parks v. Wilson*, 872 F. Supp. at 1470.

105. See *Rubin v. Ikenberry*, 933 F. Supp. 1425 (C.D. Ill. 1996).

106. See *Mann v. University of Cincinnati*, 864 F. Supp. 44 (S.D. Ohio 1994).

107. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1412 (11th Cir. 1997)(Barkett, J., dissenting), cert. granted, 119 S. Ct. 29 (1998).

108. 20 U.S.C. § 1681(a).

109. *Davis*, 120 F.3d at 1415.

Indeed, "the United States Supreme Court has already endorsed the adoption of substantial aspects of Title VII law into Title IX for teacher-to-student hostile environment sexual harassment."¹¹⁰ Granted, many of these cases involve primary or secondary schools where the greater need for discipline may outweigh other interests in public discourse,¹¹¹ but Title IX has also been used to apply the HWE standard to sexual harassment at the university level.¹¹² Nor do these cases involve only university employment, where Title VII principles would be appropriate; many of Title IX's sexual harassment claims begin in the classroom. They include such cases as *Rubin v. Ikenberry*,¹¹³ where a professor regularly engaged in outrageous "sexual commentary, inquiries and jokes during class."¹¹⁴ If, as the *UWM Post* court maintains, Title VII is limited to employment matters and Title IX restricted to academia, then cases like *Rubin* should have been rejected. If anything, however, the courts have erred in the other direction. The Supreme Court established in *Franklin v. Gwinnett County Public Schools* that a student has an action for sexual harassment under Title IX similar to that which an employee has under Title VII:¹¹⁵

Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student.¹¹⁶

110. Edward S. Cheng, *Recent Development: Boys Being Boys and Girls Being Girls—Student-to-Student Sexual Harassment from the Courtroom to the Classroom*, 7 UCLA WOMEN'S L.J. 263, 315 (1997).

111. See, e.g., *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993).

112. See, e.g., *Moire v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986); see also, *Bishop v. University of Ala.*, 926 F.2d 1066 (11th Cir. 1991).

113. *Rubin v. Ikenberry*, 933 F. Supp. 1425 (C.D. Ill. 1996).

114. *Id.* at 1429.

115. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

116. *Id.* at 75 (alteration in original)(citation omitted). A California court further stated that "distinctions between the school environment and the workplace serve only to emphasize the need for zealous protection against sex discrimination in the schools." *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993).

Title IX is only the first of a wave of new statutes that are applying legal norms from the workplace to the classroom. The Department of Education, among others, has issued a "Notice of Investigative Guidance" detailing the procedures and analysis its staff "will follow when investigating issues of racial incidents and harassment against students at educational institutions."¹¹⁷ In many ways, the Department's Guidance mirrors the speech codes shot down by the courts, but as of today the Guidance still stands, applying norms from sexual harassment law to the classroom. As the Guidance states:

A violation . . . may also be found if [an educational institution] has created or is responsible for a racially hostile environment—i.e., harassing conduct (e.g., physical, *verbal*, graphic or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by [the institution].¹¹⁸

Again, if the *UWM Post* court is correct, the Guidance should fall, as should statutes passed by the California, Illinois, and Wisconsin legislatures. In each state, lawmakers have "enacted legislation to combat sexual harassment in education and/or post-secondary institutions as well [as] on the job."¹¹⁹ It simply cannot be the case, then, that Title VII principles fail to reach the educational setting. Although Judge Warren may opine as much, his brethren, as well as the Department of Education and at least three state legislatures, disagree.

Furthermore, the EEOC has reinforced the connection between workplace and classroom when it recently extended Title VII's reach. Originally, the EEOC's regulations prohibited only sexual harassment. However, in the early 1990s, the EEOC amended its regulations to announce what the courts had recognized earlier—that the "principles [of sexual harassment law] continue to apply to race, color, religion or national origin."¹²⁰ The EEOC did more, however. In adopting a generic harassment provision, the Commission borrowed almost directly from the collegiate hate speech codes. Under its new regulation,

117. Notice of Investigative Guidance, 59 Fed. Reg. 11448 at 11448 (1994).

118. Notice of Investigative Guidance, 59 Fed. Reg. at 11449 (emphasis added).

119. MOREWITZ, *supra* note 23, at 267 (citing JOHN LEWIS ET AL., SEXUAL HARASSMENT IN EDUCATION (1992)).

120. 29 C.F.R. § 1604.11(a) n. 1 (1998).

employers may now be held liable for creating a work environment where "ethnic slurs and other verbal or physical conduct relating to an individual's national origin" are tolerated.¹²¹ Certainly, the EEOC may have come to this rule on its own, but the inclusion of ethnic slurs is just too similar to Wisconsin's and Stanford's speech codes—both of which covered ethnic slurs or epithets. When one also considers that the EEOC developed this new rule shortly after Michigan and Wisconsin enacted their speech codes, it seems likely that the EEOC was taking a lesson from academia. Like those entities that extended Title VII to the educational environment, the EEOC also recognized a connection between the classroom and the workplace.

B. Special Status of Colleges and Universities

Even if Title VII principles extend to academic life, courts may be reluctant to enforce speech restrictions, whether premised on racial or other forms of harassment, for fear of chilling intellectual inquiry on campus. Perhaps the best example of a court's concern is *Cohen v. San Bernardino Valley College*,¹²² where the Ninth Circuit Court of Appeals refused to enforce a college's sexual harassment policy against an English professor.¹²³ In that case, the College of San Bernardino had adopted a sexual harassment policy modeled almost identically on Title VII standards.¹²⁴ Shortly after its adoption, a female student charged her professor with violating the new policy for his "statements and conduct" in class.¹²⁵ The professor taught a required remedial English course, and according to the district court, used a "controversial teaching style," which included a "repeated focus on topics of a sexual nature" and regular "use of profanity and vulgarities."¹²⁶ In the spring semester of 1992:

121. 29 C.F.R. § 1606.8(b) (1998).

122. *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996). Under the policy, a faculty member could be disciplined for "unwelcome sexual advances, requests for sexual favors and other verbal, written or physical conduct of a sexual nature" when "such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile or offensive learning environment." *Cohen*, 92 F.3d at 971.

123. *Id.* at 970.

124. *See Cohen*, 92 F.3d at 970–71.

125. *Cohen*, 92 F.3d at 970.

126. *Cohen*, 92 F.3d at 970.

[He] began a class discussion on . . . the issue of pornography and played the "devil's advocate" by asserting controversial viewpoints. During classroom discussion on this subject, [the professor] stated in class that he wrote for *Hustler* and *Playboy*, and he read some articles out loud in class. [He] concluded the class discussion by requiring his students to write essays defining pornography. . . . According to [the student, the professor] then told her that if she met him in a bar he would help her get a better grade. She also claimed that [he] would look down her shirt, as well as the shirts of other female students, and that he told her she was overreacting because she was a woman.¹²⁷

Were a similar fact pattern to occur in the workplace, a court would likely find a violation of sexual harassment. Indeed, *Cohen* is not that different from *Morgan v. Hertz*,¹²⁸ where a supervisor questioned employees about their sexual practices,¹²⁹ or *EEOC v. Horizons Hotel Corp.*, where a coworker unleashed a "stream of comments about [the plaintiff's] body" and propositioned her for sex.¹³⁰ In *Cohen*, however, the Ninth Circuit ruled that the professor's behavior:

did not fall within the core region of sexual harassment as defined by the Policy. Instead, officials of the College, on an entirely ad hoc basis, applied the Policy's nebulous outer reaches to punish teaching methods that [the professor] had used for many years. . . . [The professor] was simply without any notice that the Policy would be applied in such a way as to punish his longstanding teaching style¹³¹

It is difficult to see how the court could reach this decision unless it concluded that special "protection [should] be given a public college professor's classroom speech."¹³² Among other things, its conclusion that the faculty member had to be warned of the policy's reach would be preposterous if applied in the workplace. In such case, a group of

127. *Cohen v. San Bernardino Valley College*, 883 F. Supp. 1407, 1410 (C.D. Cal. 1995), *rev'd*, 92 F.3d 968 (9th Cir. 1996).

128. *Morgan v. Hertz Corp.*, 542 F. Supp. 123 (W.D. Tenn. 1981).

129. *See id.* at 128.

130. *EEOC v. Horizons Hotel Corp.*, 831 F. Supp. 10, 12 (D.P.R. 1993).

131. *Cohen*, 92 F.3d at 972.

132. *Cohen*, 92 F.3d at 971.

men who had previously hassled their female coworkers could not be held responsible under a sexual harassment rule unless they were first personally warned. This is simply not the case, as employees are held responsible for informing themselves of new personnel policies and conforming their behavior to any new standards.¹³³

Cohen is one of the few cases in which a court has refused to apply a sexual harassment policy to the classroom setting,¹³⁴ but its deference to the academic process may be reflected in the *Doe*, *UWM Post*, *Dambrot*, and *Corry* courts' decisions to overturn university speech codes. One sees strands of this perspective in Judge Warren's statement that the UW Rule "limits the diversity of ideas among students and thereby prevents the 'robust exchange of ideas' which intellectually diverse campuses provide."¹³⁵ Universities occupy a hallowed position in American cultural life. We enshrine scholarly life, as politicians, journalists, and other opinion leaders prize the intellectual inquiry carried on there. It is not inconceivable that the courts too would join this chorus by applying a heightened First Amendment standard to campus speech rules.

However, this approach overstates the importance of campus speech while ignoring the fact that one of the most basic elements of university life routinely violates free speech norms. As Kingsley Browne has argued, "some who would protect the speech of students and faculty [above that of ordinary citizens] possess an elitist perspective that simply values the former group of speakers more than the latter."¹³⁶ Browne may exaggerate a bit, but there are those who would enshrine classroom speech under the cloak of academic freedom and sequester it from any restrictions whatsoever. Estlund suggests as much when she says, "[t]he academy is so central [to the system of freedom of expression] that it claims its own branch of First Amendment doctrine: academic freedom."¹³⁷

However, as the Eleventh Circuit reminds us, academic freedom is not an independent First Amendment right.¹³⁸ To the contrary, col-

133. See, e.g., *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993).

134. See also *Silva v. University of N.H.*, 888 F. Supp. 293, 315 (D.N.H. 1994) (finding university's sexual harassment policy limited academic freedom by using a subjective standard).

135. *UWM Post v. Board of Regents*, 774 F. Supp. 1163, 1176 (E.D. Wis. 1991).

136. Browne, *supra* note 8, at 482.

137. Estlund, *supra* note 8, at 774-75.

138. See *Bishop v. University of Ala.*, 926 F.2d 1066, 1075 (11th Cir. 1991).

leges may regulate expression of students where it materially disrupts classwork or other university activities or unduly interferes with the rights of others.¹³⁹ In fact, as Cass Sunstein notes, "colleges and universities are often in the business of controlling speech, and their controls are hardly ever thought to raise free speech problems."¹⁴⁰ He adds:

There are major limits on what students can say in the classroom. For example, they cannot discuss the presidential election if the subject is math. The same is true for faculty members. . . .

. . . The problem goes deeper. A paper or examination that goes far afield from the basic approach of the course can be penalized without offense to the First Amendment.¹⁴¹

Sunstein's approach is supported by two recent cases on classroom speech. In both *Bishop* and *Rubin*, the courts made clear that academic speech is not immune from sanction.¹⁴² Both courts willingly deferred to a university's attempt to restrict coercive and harassing speech during classroom discussion. The Eleventh Circuit was perhaps the most adamant, ruling that "educators do not offend the First Amendment by exercising editorial control over the style and content of student (or professor) speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."¹⁴³

There are those observers who would decry the *Bishop* and *Rubin* decisions, seeing them as clear cases of viewpoint discrimination.¹⁴⁴ If they are viewpoint discrimination, however, they are no different from *HWE* which also punishes individuals for specific speech—that which discriminates against women. The question is why so many observers, and several courts, instinctively flinch when such restrictions are applied to the college campus. Undoubtedly, some are worried about censorship or creeping restrictions on provocative thought. To be sure, there is reason to fear censorship. Apart from the McCarthy era, there

139. See Coleman & Alger, *supra* note 93, at 121.

140. Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 830 (1993).

141. Sunstein, *supra* note 140, at 830.

142. *Bishop*, 926 F.2d at 1077; *Rubin v. Ikenberry*, 933 F. Supp. 1425, 1433 (C.D.Ill. 996).

143. *Bishop*, 926 F.2d at 1074.

144. See Browne, *supra* note 8; Volokh, *supra* note 50.

have been cases in which university officials censored or expelled students because they deviated from "proper" values or beliefs.¹⁴⁵ And, of course, the fear of chilling speech is real, especially in an environment that prizes open dialogue.

It is entirely possible, however, to use Title VII norms to forbid harassment in the classroom without touching other speech that is endemic to the educational mission. That higher education tolerates and encourages freedom of thought does not mean that we should hold off from punishing harassment in the classroom. In fact, harassment cases arise only infrequently and are hardly the epidemic that some claim. The terms of the offense insure this. By requiring that conduct be so severe or pervasive that it affects the educational environment, harassment policies screen out many comments and behavior that are merely annoying, distasteful, or occur only once or twice.

Still, the academic community may object, arguing that their focus on literature, politics, and the like commands complete freedom from judicial interference. But this argument obscures two points. First, it is the schools themselves that seek to punish harassing speech; if anything the courts have traditionally deferred to college administrators to set their own rules.¹⁴⁶ More importantly, their objection obscures a larger reason behind many academicians'—and courts'—opposition to speech codes: they don't want the responsibility of evaluating which speech is permissible and which comments are harassing. I can certainly appreciate this concern, but it fails to relieve them of the responsibility of removing harassment from the academic environment. The task is hardly different from other settings, where supervisors have to distinguish between harmless expressions of opinion and those that actively discriminate.¹⁴⁷ Professors and administrators may not think this is their duty, but they have been doing similar things for years. Just as a teacher may punish a student for speaking out of turn or straying wildly off topic, so may he rein in a student who seeks to harass another in class. A similar point holds true for the courts. Just as they have allowed employers to discipline employees who harass coworkers, they owe colleges the deference to

145. In the 1928 case, *Anthony v. Syracuse Univ.*, 224 A.D. 487, 488 (N.Y. App. Div. 1928), the Supreme Court of New York permitted university administrators to expel a student because "they did not think of her [as] 'a typical Syracuse girl.' "

146. See Coleman & Alger, *supra* note 93; Carrie N. Baker, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L.J. 271 (1994).

147. See KENT GREENAWALT, *SPEECH, CRIME AND THE USES OF LANGUAGE* (1989).

punish those students who interfere with the educational rights of others.

C. Universities Overstepping Their Own Policies.

In at least two of the collegiate speech cases, the courts could have simply ruled that the universities' application of their speech rules was unconstitutional. This is not the same as saying that the codes themselves were unconstitutional, for as I have argued earlier they so closely mirror Title VII's sexual harassment standards that the rules alone should be constitutional. However, both the Universities of Michigan and Wisconsin applied their rules so expansively that a court would have been justified in ruling them unconstitutional under Title VII.

As the court rightly noted in *Doe*, the University of Michigan issued an Interpretive Guide that was so "integrally related" to its speech code that it became "an authoritative interpretation of the [code] and provided examples of sanctionable conduct."¹⁴⁸ According to the Guide, students might have been found liable under the hate speech code for any of the following misdeeds:

- Inviting "everyone on [your] floor [to a party] except one person because [you] think she might be a lesbian."¹⁴⁹
- Excluding "someone from a study group because that person is of a different race, sex, or ethnic origin than you are."¹⁵⁰
- Laughing "at a joke about someone in your class who stutters."¹⁵¹

At the University of Wisconsin, administrators did not issue an interpretive guide, but they also took an expansive interpretation of their speech code. As the court noted in *UWM Post*, the Wisconsin rule was applied to the following altercations:

148. *Doe v. University of Mich.*, 721 F. Supp. 852, 857–58 (E.D. Mich. 1989).

149. *Doe*, 721 F. Supp. at 858.

150. *Doe*, 721 F. Supp. at 858.

151. *Doe*, 721 F. Supp. at 858.

- At the University of Wisconsin-Oshkosh a female student referred "to a black female student as a 'fat-ass nigger' during an argument."¹⁵²
- At the University of Wisconsin-Oshkosh, a student angrily told an Asian-American student that, "It's people like you—that's the reason this country is screwed up" and "you don't belong here."¹⁵³
- At the University of Wisconsin-River Falls, a male student yelled at a female student in public, saying, "you've got nice tits."¹⁵⁴

Undoubtedly, each of these instances is contemptible, and the students involved should have been rebuked for their conduct. But not a single one of these instances would qualify as harassment under Title VII. As the courts make clear, behavior must be "severe" and/or "pervasive" to reach the threshold of harassment.¹⁵⁵ "Mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to violate Title VII."¹⁵⁶ So too in the collegiate context, it seems unlikely that a single epithet would so alter the conditions of academic life that it creates an hostile or abusive educational environment.

If the *Doe* or *UWM Post* courts had merely rested their decisions on this basis, I would have folded up my soapbox and gone home. Both courts, however, used this justification as only an opening rebuke to campus speech codes. Indeed, it's as if by "protesting too much" the courts suggest other explanations for their decisions. *Doe* was the first case to consider collegiate speech codes, and it is a thoroughly written opinion. Judge Cohn examined the wording, application, and "legislative history" of Michigan's rule before finding that administrators had interpreted the code too broadly.¹⁵⁷ At this point he could have ended the case with a judgment against the university. Nevertheless, he pressed on to consider whether the rule was also unconstitutionally vague.¹⁵⁸ This is hardly unusual, for courts often look to multiple bases for their decisions, but his treatment of the

152. *UWM Post v. Board of Regents*, 774 F. Supp. 1163, 1168 (E.D. Wis. 1991).

153. *UWM Post*, 774 F. Supp. at 1167.

154. *UWM Post*, 774 F. Supp. at 1168.

155. See LINDEMANN & KADUE, *supra* note 7, at 594.

156. *Kishaba v. Hilton Hotels, Corp.*, 737 F. Supp. 549, 555 (D.C. Haw. 1990).

157. *Doe*, 721 F. Supp. at 864.

158. *Doe*, 721 F. Supp. at 866.

"vagueness question" is peculiar. The Judge found "the plain language of the Policy" to be impermissibly vague since "it was simply impossible to discern any limitation" on the terms "stigmatize" or "victimize."¹⁵⁹ Both of these words, said the court, "are general and elude precise definition."¹⁶⁰

Yet a similar argument could be made for the terms "severe" or "pervasive" under Title VII. Like stigmatize or victimize, "these words can only be understood with reference to some exogenous value system. What one individual might find [severe] or [pervasive] another individual might not."¹⁶¹ In fact, the Supreme Court has acknowledged that a hostile environment "is not, and by its nature cannot be, a mathematically precise test."¹⁶² Even Justice Scalia of all people admits that the terms "abusive" or "hostile" do "not seem to me to be a very clear standard. . . . Be that as it may, I know of no other alternative."¹⁶³

The Supreme Court's flexibility has filtered its way down to the lower courts, where many have been quite willing to read in a definition to the severe and pervasive tests; some have gone so far as to create a separate reasonableness test to measure pervasiveness. A good example is *Rubin*, where a federal court upheld the University of Illinois' sexual harassment policy even though its terms were at least as vague as the speech code in *Doe*.¹⁶⁴

Nor is Title VII the only area of the law in which the Supreme Court tolerates ambiguity. The Court has upheld bans on "loud and raucous" noises despite their subjective nature.¹⁶⁵ And, of course, the standards for obscenity law are vague, it being difficult to define precisely whether a work is "patently offensive" or appeals to the "prurient interest."¹⁶⁶ In each of these areas the courts are willing to overlook ambiguous terms or even fill in the details of vague standards. Given

159. *Doe*, 721 F. Supp. at 867.

160. *Doe*, 721 F. Supp. at 867.

161. *Doe*, 721 F. Supp. at 869.

162. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993).

163. *Harris*, 510 U.S. at 23-24 (Scalia, J., concurring).

164. *Rubin v. Ikenberry*, 933 F. Supp. 1425, 1430 (C.D.Ill. 1996) The University of Illinois Handbook of Policies and Regulations defines sexual harassment as "[a]ny unwanted sexual gesture, physical contact, or statement that a reasonable person would find offensive, humiliating, or any interference with his or her required tasks or career opportunities at the University."

165. See *Kovacs v. Cooper*, 336 U.S. 77 (1949).

166. See *Miller v. California*, 413 U.S. 15 (1973).

such deference, it is difficult to understand why the *Doe* court was so reluctant to define stigmatize or victimize.

In this vein, there was also ample opportunity for the *Doe* and *UWM Post* courts to sidestep the constitutional issues if they had wanted to uphold the university speech codes. Rather than throwing out the entire code, either court might have borrowed from sexual harassment law by limiting the speech rules to behavior that was severe or pervasive. Granted, both universities would have had to backtrack in the application of their codes (seeing that most of the incidents had failed to reach severe or pervasive behavior), but the codes themselves could have stood. This is hardly novel. Given that both codes were modeled on Title VII, it would have been entirely reasonable to use the same test. What's more, neither court would have had to abandon free speech concerns to uphold the collegiate codes. As two commentators have noted, "[b]y usually requiring outrageously demeaning or insulting remarks to have been directed at the complainant before a hostile environment claim succeeds, courts have in effect incorporated First Amendment concerns into the definition of sexual harassment."¹⁶⁷ All that was needed in this instance was a little creativity and an interest in keeping the speech codes viable. Neither was forthcoming.

D. Conduct vs. Speech

Finally, it is possible that the courts distinguished between sexual harassment laws and hate speech codes by figuring that the former involved "action" but that the latter concerned "speech." It is well settled in U.S. constitutional law that the First Amendment attaches to "expression," a term that is generally considered to mean speech. Certainly, some actions can be expressive, including the burning of the flag¹⁶⁸ or a draft card,¹⁶⁹ or the donning of offensive apparel.¹⁷⁰ For the most part, however, the courts tend to distinguish between speech,

167. LINDEMANN & KADUE, *supra* note 7, at 594.

168. See *Texas v. Johnson*, 491 U.S. 397 (1989).

169. See *United States v. O'Brien*, 391 U.S. 367 (1969).

170. See *Cohen v. California*, 403 U.S. 15 (1971) (holding that First Amendment bars punishment of antiwar protestor for wearing jacket that said "Fuck the Draft" because of the expressive content of the message).

which is expressive and thus protected, and actions which are neither. There are few bases to restrict protected speech.¹⁷¹

Under Title VII, courts have been known to "try to finesse difficult First Amendment analysis by characterizing disagreeable expression as 'conduct,' " or actions, and not speech."¹⁷² In the case of *Robinson v. Jacksonville Shipyards*,¹⁷³ for example, a federal court ruled that pornographic pictures "were not in fact expression but rather 'discriminatory conduct' . . . even though the fact remains that displaying pornographic pictures is expression."¹⁷⁴ Even the Supreme Court has taken up this line in trying to explain the constitutionality of sexual harassment law. As the Court said in *R.A.V.*,¹⁷⁵ "sexually derogatory 'fighting words'" may be regulated because they are "swept up incidentally within the reach of a statute directed at conduct rather than speech."¹⁷⁶

Conversely, it is clear that the courts in *Doe*, *UWM Post*, *Dambrot*, *CMU*, and *Corry* all considered the collegiate hate codes to apply predominately to speech. The *Doe* court began and ended its opinion with philosophical essays on the importance of protected speech.¹⁷⁷ In *UWM Post*, the court took to calling the UW Rule a content-based restriction of speech.¹⁷⁸ Even the *Dambrot* and *Corry* courts called the universities' rules speech codes.¹⁷⁹ Admittedly, the fact patterns in *Doe* and *CMU* covered individuals' speech, but the policies themselves governed both speech and action. Michigan's policy covered "[a]ny behavior, verbal or physical."¹⁸⁰ CMU's rule included "physical, verbal, or nonverbal behavior."¹⁸¹ At Wisconsin, the code was not only titled

171. As one commentator rightly points out, there is "no expression that is protected or unprotected under all circumstances. A political speech may be prohibited by regulations prohibiting noise in an intensive-care unit, and obscenity may not be prohibited by a law that distinguishes among obscene expressions based upon their political content." Browne, *supra* note 7, at 483. The point is that, absent a compelling basis, speech may rarely be restricted while actions are open to regulation.

172. LINDEMANN & KADUE, *supra* note 7, at 598.

173. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991).

174. LINDEMANN & KADUE, *supra* note 8, at 598.

175. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

176. *Id.* at 389.

177. *See Doe v. University of Mich.*, 721 F. Supp. 852, 853, 868 (E.D. Mich. 1989).

178. *See UWM Post v. Board of Regents*, 774 F. Supp. 1163, 1173-74 (E.D. Wis. 1991).

179. *See Dambrot v. Central Mich. Univ.*, 839 F. Supp. 477, 481 (E.D. Mich. 1993);

Corry v. Stanford Univ., No. 740309 at 12 (Cal. Super. filed Feb. 27, 1995).

180. *Doe*, 721 F. Supp. at 856.

181. *Dambrot*, 839 F. Supp. at 481.

"Discriminatory Harassment: Prohibited Conduct Under Chapter UWS 17 Revisions," but it was drafted to cover "comments, epithets or other expressive behavior or physical conduct."¹⁸² Only at Stanford did the plain language of the rule prohibit "speech or other expression [that] constitutes harassment by personal vilification."¹⁸³

The difficulty of this division between Title VII and collegiate hate codes is that it ignores a constitutional dilemma they share. It has not been the case that sexual harassment covers action to the exclusion of expression. "[C]ourts have consistently interpreted [Title VII to include] 'verbal expression.' Relying on the EEOC's definition of hostile-environment harassment, courts, both state and federal, have found employers liable for . . . 'obscene propositions,' sexual vulgarity, . . . racial jokes, slurs, and other statements deemed derogatory to minorities" ¹⁸⁴ Indeed, expression "is often a substantial, if not the primary, basis" that courts use to impose liability.¹⁸⁵ Courts may be "offended by the implicit or explicit message of the expression—for example, that women should be sexual playthings for men, that women (or blacks) do not belong in the workplace, or that they should hold an inferior position in our society."¹⁸⁶

A quick perusal of sexual harassment cases shows this explanation to be true. As described earlier, the Supreme Court in *Harris* permitted liability when the company president referred to the plaintiff as "a dumb ass woman" and "made her the target of unwanted sexual innuendos."¹⁸⁷ In *Katz v. Dole*,¹⁸⁸ the court found liability under Title VII for "extremely vulgar and offensive sexually related epithets," including words "widely recognized as not only improper but as intensely degrading, deriving their power to wound not only from their meaning but also from the 'disgust and violence they express phonetically.' "¹⁸⁹ The list goes on. In *EEOC v. Hacienda Hotel*¹⁹⁰ the Ninth Circuit premised liability on comments comparing the victim to a "dog" and "whore" and suggesting that women "get pregnant because they like to

182. *UWM Post*, 774 F. Supp. at 1165–66.

183. *Corry*, No. 740309 at 3.

184. Browne, *supra* note 8, at 482–83.

185. Browne, *supra* note 8, at 483.

186. Browne, *supra* note 8, at 483.

187. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 19 (1993).

188. *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983).

189. *Id.* at 254.

190. *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989).

suck men's dicks."¹⁹¹ Similarly, in *EEOC v. Horizons Hotel Corp.*,¹⁹² a district court based its finding of sexual harassment on a coworker's "steady stream of comments about [the plaintiff's] body."¹⁹³ And in *Jenson v. Eveleth Taconite Co.*, a federal court formally recognized that pornographic pictures and "sexually-focused" expression "constitute acts of sexual harassment."¹⁹⁴

In each of these cases, expression was either the primary or a substantial factor in finding harassment. As such, they are hardly that different from some of the scenarios to which the collegiate hate codes were, or could have been, applied. A supervisor who "yell[s] epithets loudly at a woman for approximately ten minutes, calling her a 'fucking bitch' and 'fucking cunt,'" would undoubtedly reach the level of sexual harassment under Title VII, just as the student was found to have violated the University of Wisconsin's hate code in *UWM Post*.¹⁹⁵ If, then, the courts are prepared to overrule collegiate hate codes because they reach expression, they need to be ready to do the same for sexual harassment under Title VII. Although the Supreme Court has yet to decide whether Title VII imposes "liability solely on the basis of . . . expression,"¹⁹⁶ it is clear that the lower federal and state courts are

191. *Id.* at 1508.

192. *EEOC v. Horizons Hotel Corp.*, 831 F. Supp. 10 (D.P.R. 1993).

193. *Id.* at 12. According to the court, the coworker's

comments ranged from telling plaintiff that she had a beautiful body to telling her that he knew that she was in very good condition. He also told her sexual puns with double meaning (i.e. 'if the breast looks like this how is the rest?'). He called her legs 'sweet potatoes' and 'delicious calves.'

Horizons Hotel., 831 F. Supp. at 12 n.5.

194. *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 880 (D. Minn. 1993). The court could hardly have been more clear in stating that sexual harassment can be founded on expression. As part of its analysis, the court observed that

Eveleth Mines' work environment was characterized by verbal statements and language reflecting a sexualized, male-oriented, and anti-female atmosphere. Language at Eveleth Mines was generally coarse; both men and women cursed and used words with a sexual referent. Strikingly, however, only men went further and used language either (1) referring to women generally in terms of their body parts, and/or (2) directing comments to or about specific women and their sex lives, including proposing sexual relationships and discussing sexual exploits. Related to this second variety of language was the use of 'pet names' and terms that persons in romantic relationships might use, e.g., 'honey' or 'babe.'

Jenson, 824 F. Supp. at 880.

195. See *UWM Post v. Board of Regents*, 774 F. Supp. 1163, 1167 (E.D. Wis. 1991).

196. Browne, *supra* note 8, at 483.

moving to allow this claim.¹⁹⁷ In so doing, they appear to conflict with those courts that rejected the collegiate hate speech codes as being unconstitutional.

IV. SOCIAL AND CULTURAL EXPLANATIONS

My point is not that the courts were wholly unjustified in overturning collegiate hate codes while upholding sexual harassment law.¹⁹⁸ I know, in some sense, that I am arguing against conventional legal wisdom which holds that any of the preceding four explanations could have defended the distinction between hate codes and sexual harassment. But I want to suggest that the courts' explanations are hardly ironclad and that there may be other more veiled bases for these decisions. More to the point, I think this whole enterprise illustrates the role of the courts as political institutions. Whether influenced by the persistence of organized litigants, acting on their own to address cultural or social concerns, or responding to changing public opinion, the courts were doing more than simply "applying the law" in upholding sexual harassment claims and rejecting collegiate hate speech codes.

The concept that courts are political institutions is hardly new, although it contrasts sharply with the long-held traditional model of adjudication that posits "a detached and dispassionate judge arriving at objective conclusions through the application of neutral rules."¹⁹⁹ Over the years many theorists have criticized the traditional model, seeing it as incomplete or naive.²⁰⁰ The line stretches at least as far back as legal realism and continues to the present day with critical legal studies and critical race theory.²⁰¹ My intent is not to choose among the various

197. In California, for example, the state Court of Appeals has concluded that the "continued use of racist epithets in the workplace . . . create[s] an abusive work environment, [and] does not violate the constitutional proscription against prior restraints" *Aguilar v. Avis Rent-A-Car System*, No. A069353 (Cal. Ct. App. filed May 21, 1996).

198. Indeed, as I have suggested, the *Doe* and *UWM Post* courts were correct in finding that university administrators overreached in the application of their codes.

199. PATRICIA SMITH, *FEMINIST JURISPRUDENCE* 211 (1993); see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

200. See KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1951); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 342 (1991).

201. See, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997); LLEWELLYN, *supra* note 200.

alternatives, but rather to suggest that their common theme is correct: "treating courts and judges as either philosophers on high or as existing solely within a self-contained legal community ignores what they actually do."²⁰² Courts "must be treated as [the] political institutions [they are] and studied as such."²⁰³

What does it mean to say that courts are political institutions? It should not imply that judges are equivalent to politicians, making decisions to please particular constituencies or blatantly ignoring precedent to impose their own preferences. It does mean, however, that courts operate in a political environment and are open to political pressures. Among other things, judges may reflect the ideologies of the politicians who appoint them; they may bring certain biases to the cases; they may broker voting coalitions among their brethren; or they may be attuned to the effects of their decisions and the public's acceptance of their legitimacy.

This depiction not only better explains what courts do, but in the case of sexual harassment law and hate speech codes, it more accurately describes the courts' divergent treatment. Here, I postulate four different theories that explain the courts' motives. First, in a more dispassionate way, the courts may simply have responded to a better organized group of litigants in supporting sexual harassment law and rejecting campus speech codes. Second, whether acting on their own conservative agenda or reacting to the public mood, the courts may have rebuffed collegiate hate codes as a way of retarding the "political correctness" movement. Third, the courts' preference for sexual harassment law over hate speech codes may reflect their desire to keep sexuality out of public life, and with it, women too. Finally, to the extent that sexual harassment law is about gender protection, it may be that the courts themselves—or the public at large—believe women still deserve legal help but that racial minorities no longer merit similar protection.

A quick perusal of these theories shows some to be complementary and others exclusive. For example, it is possible that the courts were egged on by advocates who simultaneously pushed to protect sexual harassment law and oppose political correctness. Conversely, it seems unlikely that courts would adopt sexual harassment restrictions to return women to private life, while at the same time offering

202. ROSENBERG, *supra* note 200, at 342.

203. ROSENBERG, *supra* note 200, at 342.

women legal help when they venture out into the workplace. That these approaches overlap and intertwine should not be seen as a weakness to my approach. I do not intend to offer *the* definitive answer for why courts treat sexual harassment law and hate speech codes differently. Rather, I argue that traditional legal analysis does not answer this question and that we need to search elsewhere for answers. My postulations, then, should be seen for what they are: a first step in reconsidering this question.

A. Power of Advocates

In his recent book, *Hate Speech: The History of an American Controversy*, Samuel Walker argues that American law is shaped by the strength and resolve of interest groups who are willing to repeatedly advance their positions in court.²⁰⁴ The courts, after all, cannot choose which issues they hear, and the decisions that follow depend in some part on the willingness of various litigants to raise them. To the extent that an idea has "a vigorous and effective advocate," it stands a better chance of ultimately prevailing than if its litigants are only tepidly supportive.²⁰⁵ As Walker says:

Freedom of speech for unpopular ideas did not become a living reality until the middle of the twentieth century. Although that protection was ultimately the result of a series of Supreme Court decisions, we must ask what caused the Court to change. The American Civil Liberties Union was a critical advocate for free speech for the unpopular. The ACLU was the lone champion of free speech through the 1920s and early 1930s and filed briefs in all the major cases through which the Court fashioned the body of modern First Amendment law. The perspective here shifts our focus away from the Court, now seen more as a reactive agent, and toward the advocates who brought the cases and arguments before it.²⁰⁶

204. SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 14-15 (1994).

205. See WALKER, *supra* note 204, at 15.

206. WALKER, *supra* note 204, at 14-15.

Walker's theory is consistent with several other findings in public law. Over the past thirty years,

judicial scholars have found that litigant status does provide one explanation for the variation found in [the Supreme Court's] decisions to grant writs of certiorari. . . . Additionally, a number of studies have found litigant status to be significantly related to outcomes on the merits in the lower courts. . . . Most of these studies draw on the theoretical premise . . . that 'repeat players' are more likely than 'one shot' players to be successful in the courts.²⁰⁷

This analysis may help to explain the divergence between sexual harassment law and collegiate hate codes. Sexual harassment litigation has a long history of organized feminist support. As Stephen Morewitz explains in his book, *Sexual Harassment & Social Change In American Society*, sexual harassment law developed out of the burgeoning women's movement.²⁰⁸ As women began to "see their situations as political and institutional rather than as personal, idiosyncratic dilemmas," they spurned "the biological and social assumptions of sexual harassment."²⁰⁹ With the support of the National Organization for Women (NOW) and the Women's Legal Defense Fund (WLDF), litigants have come forward to challenge sexual advances on the job and the hostile environments in which they work. Success has only brought more success. Early victories gave others the confidence and motivation to begin to make formal sexual harassment claims against their own coworkers or supervisors.²¹⁰

These litigants also found an ally in the EEOC. Under current employment law, an individual first registers her complaint with the EEOC, which investigates the merits of her charge.²¹¹ If it finds a likely

207. Reginald S. Sheehan, *Governmental Litigants, Underdogs, and Civil Liberties: A Reassessment of a Trend in Supreme Court Decision-making*, 45 W. POL. Q. 27 (1992). Other recent studies show that amici are also influential in affecting decisions of the Supreme Court. See Gregg Ivers & Karen O'Connor, *Friends as Foes: The Amicus Curiae Participation and Effectiveness of the American Civil Liberties Union and Americans for Effective Law Enforcement in Criminal Cases*, 9 LAW & POL'Y 161 (1987).

208. MOREWITZ, *supra* note 23, at 222-23.

209. MOREWITZ, *supra* note 23, at 222-23.

210. See MOREWITZ, *supra* note 23, at 222-23.

211. See generally, LAWYERS COOPERATIVE PUBLISHING, *Handling Sexual Harassment Cases* (1993).

violation of Title VII, the EEOC has the right to prosecute the case in court, where it becomes a valuable organizational ally. The EEOC has the experience and resources to effectively litigate the matter, and its status may well carry certain weight in the courts. As many studies have demonstrated, federal agencies have "overwhelming success" when appearing before the federal courts.²¹² These studies indicate that federal agencies win over two-thirds of the cases in which they participate.²¹³

The power of such organizational support—whether from legal advocacy groups like WLDF, or from governmental agencies like the EEOC—should not be underestimated in measuring the courts' recognition of sexual harassment claims. Given that sexual harassment was once "so routinely considered normal,"²¹⁴ it has taken repeated, organized litigation to convince courts of the seriousness of sexual harassment and the need for judicial action.

By the same analysis, it is hardly surprising that the courts have failed to recognize the constitutionality of collegiate speech codes. Not only were their advocates less organized and committed, but the codes themselves faced powerful opposition in the courts.

Samuel Walker argues that the codes had a powerful coalition of supporters on university campuses, where

African American and Hispanic American groups . . . have been able to forge effective coalitions with women's groups, gay and lesbian groups, groups of physically disabled students, and so on. In addition, they can count on the active support of organized left-wing white students and the passive support of many other unaffiliated students: white, male, heterosexual, politically moderate, and so on.²¹⁵

Walker may be right about the genesis of university hate codes, but contrary to other reports in the popular press, it is questionable that the codes' true authors were passionately attached to them.²¹⁶ As an initial matter, the codes can probably be traced to a growing group

212. See Sheehan, *supra* note 207, at 27.

213. See Sheehan, *supra* note 207, at 27.

214. Estrich, *supra* note 13, at 860.

215. WALKER, *supra* note 204, at 16.

216. For a more detailed review of this issue, see Jon Gould, *Symbolic Speech: Legal Mobilization and the Rise of Collegiate Hate Speech Codes* (on file with author, publication forthcoming 2000).

of scholars studying critical race theory. Developed in the early 1980s, critical race theory was led by such faculty as Mari Matsuda, Richard Delgado, Charles Lawrence, and Kimberle Crenshaw. These scholars called for a reexamination of legal doctrines that deliberately or indirectly disadvantaged people of color, arguing that the "dominant conceptions" of law had become "increasingly incapable of providing any meaningful quantum of racial justice."²¹⁷ Together, they advocated university speech codes as a way to prevent the kind of racial harassment that hurts students of color. Richard Delgado, in particular, was one of the authors of Wisconsin's hate speech rule.

While critical race scholars were theoreticians, they were not political activists. Their greatest influence was in providing the philosophical support for speech codes. Any traditional activism came from students, a group hardly responsible for defending the codes should they be challenged in court. The legal defense fell to university administrators, who had institutional responsibility for the codes and to whom the courts turned to defend their policies. At each of the universities where codes were challenged (Michigan, Wisconsin, Stanford, and Central Michigan) the legal defense team was a joint venture between university presidents, deans, law professors and both general and outside counsels.

Yet their defense seems to have been half-hearted. While each school answered for its code at the trial level, only one university, Central Michigan, appealed the initial adverse ruling.²¹⁸ Michigan revised its code, and Wisconsin considered a new one, but neither school chose to defend its policies at the appellate level. Stanford's strategy is perhaps the most perplexing, since it was turned down by a state trial court, a decision that hardly carries significant weight on a constitutional issue. If Stanford's administrators felt strongly about their policy, or for that matter if Michigan or Wisconsin had been solidly attached to their hate speech codes, they almost assuredly would have appealed the trial courts' decisions. That only one school took this tack casts significant doubt on their commitment to the codes.

It is quite possible, as some have suggested, that the codes were only intended as a symbolic statement by university administrators to

217. Charles R. Lawrence et al., *Introduction in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 1, 3 (Mari J. Matsuda et al. eds., 1993).

218. As it had at the trial level, Central Michigan University lost its appeal. *See Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

show passing concern for students of color.²¹⁹ It is also curious that the courts' decisions—and the resulting failure of each university to appeal the unfavorable rulings—were met with little protest on campus. Perhaps the codes never had the high level of support estimated by the popular media. Perhaps, even supporters had only intended the codes as a symbolic statement—in this case, as a vehicle to highlight their concern over a receding national interest in civil rights. In either case, it is abundantly clear that the codes did not have the same level of committed support that Title VII did.

What's more, the universities were in the difficult position of playing defense against an organized opposition. Contrary to the experience of sexual harassment litigants, the universities were not joined by any legal advocacy groups, nor did the EEOC enter the litigation on their behalf. Rather, the universities found themselves pitted against an unbending wall of attorneys affiliated with the American Civil Liberties Union and the Individual Rights Foundation.²²⁰ Given the ACLU's history as "a vigorous and effective advocate,"²²¹ it is not all that surprising that they would have prevailed over universities who were "one shot players," half-heartedly defending their own speech policies.

B. Judges' Ideology

There is a long line of political science research that suggests a judge's decisions can be predicted by the ideology of the executive who appoints him,²²² the judge's background,²²³ or the judge's own ideology and values.²²⁴ In the case of the hate speech codes, all three may have come into play in overturning these campus rules.

219. See Frederick Schauer, *The Sociology of the Hate Speech Debate*, 37 VILL. L. REV. 805 (1992).

220. The ACLU brought the case in *Doe v. University of Michigan*, 721 F. Supp 852 (E.D. Mich. 1989) and assisted in *UWM Post v. Board of Regents*, 774 F. Supp 1163, 1167 (E.D. Wis. 1991). Attorneys affiliated with the Individual Rights Foundation assisted in *Corry v. Stanford Univ.*, No. 740309 (Cal. Super. filed Feb. 27, 1995).

221. WALKER, *supra* note 204, at 15.

222. See Neal C. Tate, *Personal Attribute Models of the Voting Behavior of the U.S. Supreme Court Justices*, 75 AM. POL. SCI. REV. 355, 360-61 (1981).

223. See generally AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR (Sheldon Goldman & Austin Sarat eds. 1978).

224. See generally SEGAL & SPAETH, *supra* note 199.

We begin with the ideology of the Nixon, Reagan, and Bush administrations, who appointed half of the judges who considered the speech codes and a majority of the Supreme Court that decided *R.A.V.*²²⁵ President Reagan, and to a lesser extent Presidents Bush and Nixon, “focused on the courts and the judicial system to institutionalize further its New Rightist and neoconservative policies.”²²⁶ In the case of Reagan, he “appointed more than half of the 743 federal judges then seated, more appointments than any recent predecessor has made to the federal bench.”²²⁷ The judges were chosen only after “close ideological inspection,” a fact that Edwin Meese, Reagan’s former Attorney General and Counselor, confirms in his memoirs.²²⁸ Says Meese, “if the [liberal social agenda] problems we confronted had come about because of judges, then something had to be done about the judges. . . . Accordingly, the selection of judicial personnel and reform of the judiciary became and remained important priorities of the administration.”²²⁹

If, in fact, these judges were ideological clones, we might well expect that they and their Republican brethren would reflect the ideological positions of the Reagan/Bush Administration in many of their decisions. There is hardly room in an Article of this scope to consider the various ideologies of Presidents Reagan, Bush, and Nixon, but we can say with certainty that many conservatives were preoccupied with the “political correctness” controversy in the late 1980s and early 1990s. To the extent that they linked speech codes with the burgeoning debate over “PC,” it is entirely possible that a conservative federal judiciary might have reacted against the codes to quell the social and cultural challenges they saw embodied in the PC movement.

A definition of political correctness depends in large part on the ideology of the person you ask. To some, PC was a “McCarthyism of the left,” a frontal assault on time-honored principles of Western Civi-

225. Judge Avern Cohen, who decided *Doe*, was appointed by President Carter; Judge Robert Warren in *UWM Post* was nominated by President Nixon; Judge Robert Cleland in *Dambrot* was named by President Bush; and Judge Peter Stone, the California state judge in *Corry*, was appointed by Governor Jerry Brown. Justices Scalia, O'Connor, Kennedy, Souter, and Thomas were appointed by Presidents Reagan and Bush.

226. ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* 152 (1988).

227. EISENSTEIN, *supra* note 226, at 160.

228. See EDWIN MEESE III, *WITH REAGAN* 316–20 (1992).

229. MEESE, *supra* note 228, at 316.

lization.²³⁰ To others, it represented a healthy questioning of assumed truths, particularly those based on white and/or male perspectives.²³¹ A Lexis/Nexis search from 1986–1992 finds 4,253 articles that addressed political correctness, a distinct sign of its contentiousness. It is hardly an overstatement to say that PC became the conservatives' demon. Columnists like George Will, William Safire, Charles Krauthammer, and pundit/entertainer Rush Limbaugh all took aim at the "dangerous PC trend."²³² Public figures like William Bennett, Lynne Cheney, and even President George Bush attacked what they saw as liberal orthodoxy emanating from America's campuses.²³³

Moreover, hate speech codes became symptomatic of the "PC craze." At a speech at the University of Michigan, President Bush lamented that, "[I]ronically, on the 200th anniversary of our Bill of Rights, we find free speech under assault throughout the United States, including on some college campuses."²³⁴ Bush's view was shared by many within the mainstream press, most of whom connected PC to collegiate hate codes. A short summary of headlines from the early 1990s provides ample illustrations: "'Political Correctness' Has Campuses Debating Free Speech Anew";²³⁵ "Bush & P.C.—A Conspiracy So Immense . . .";²³⁶ "It Certainly Is Crazy, But Is It Really Politically Incorrect?";²³⁷ "Free Speech Tilts With Political Correctness";²³⁸ "Two Words—'Water Buffalo'—Start Political Correctness Debate at

230. See DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE & SEX ON CAMPUS* 195 (1991).

231. See Reed Way Dasenbrock, *We've Done It To Ourselves: The Critique of Truth and the Attack on Theory*, in *PC WARS: POLITICS AND THEORY IN THE ACADEMY* (Jeffrey Williams ed., 1995).

232. See, e.g., George Will, *Curdled Politics on Campus*, *NEWSWEEK*, May 6, 1991, at 72; William Safire, *Linguistically Correct*, *N.Y. TIMES*, May 5, 1991, § 6 (Magazine), at 18; Charles Krauthammer, *Annals of Political Correctness*, *WASH. POST*, Feb. 8, 1991, at A19; Richard Corliss, *A Man, A Legend. A What!?*, *TIME*, Sept. 23, 1991, at 65.

233. See *Bush Speaks on Academic Freedom*, *UPI*, May 5, 1991, available in *LEXIS*, Nexis Library, UPI file.

234. *Bush Speaks on Academic Freedom*, *supra* note 233.

235. *Political Correctness Has Campuses Debating Free Speech Anew*, *Reuters*, Apr. 11, 1991, available in *LEXIS*, Nexis Library, Reuters file.

236. *Bush & P.C.—A Conspiracy So Immense . . .*, *THE NATION*, May 27, 1991, at 687.

237. Mike Royko, *It Certainly Is Crazy, But Is It Really Politically Incorrect?*, *ST. LOUIS POST-DISPATCH*, May 10, 1994, at 3D.

238. Bill Marrel & Barbara Kessler, *Free Speech Tilts with Political Correctness*, *ST. LOUIS POST-DISPATCH*, May 10, 1994 at 11B.

Penn.”;²³⁹ “An Incident at Stanford Sparks More Dialogue on ‘PC’ Speech.”²⁴⁰

With both the political and cultural climates embroiled in the PC battle, it is not surprising that the courts would also enter the debate. After all, the collegiate speech codes were pushed by scholars who demanded a reexamination of American law, and their agenda might have caught the courts’ attention. That said, I am unclear which of two factors would have motivated them. It might be that judges were personally worried about the influence of PC and that they took it upon themselves to block collegiate speech codes. It might also be that the courts were aware of growing political or social opposition to political correctness and that they responded to public opinion in rejecting hate speech codes.²⁴¹ In either case, though, we might explain the courts’ divergent treatment of speech codes by their concern for political correctness.

The problem with this theory is that it is difficult to prove—at least as far as showing a link between public opinion and judicial action. We know that political and social climates affect courts,²⁴² and that constitutional norms change as attitudes of the time shift.²⁴³ Beyond these connections, however, the rest of the analysis is likely to be theoretical. Few polls have tested the public’s opposition to political correctness, and the most visible is methodologically suspect.²⁴⁴ Part of the difficulty is the lack of a clear definition for political correctness. The term has become an open container of sorts for the cultural demands or fears of various groups.²⁴⁵ What we need are data showing a

239. Dale Russakoff, “Two Words—‘Water Buffalo’—Start Political Correctness Debate at Penn,” WASH. POST, May 1, 1993, at A6.

240. Ken Myers, “An Incident at Stanford Sparks More Dialogue on ‘PC’ Speech,” NAT’L LAW J., Mar. 3, 1992, at 40.

241. The “public” here need not be seen as the general public. It is possible that the courts were responding to the views of opinion leaders—politicians, journalists, and civil libertarian scholars.

242. See Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court’s Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 3 (1996).

243. See GLENDON SCHUBERT, *HUMAN JURISPRUDENCE: PUBLIC LAW AS POLITICAL SCIENCE* (1975).

244. In conjunction with MTV, *USA Today* polled 891 young adults between 16 and 29 to gauge their views on “political correctness.” The results were inconclusive. See Karen Peterson, *Political Correctness Goes Too Far, Not Far Enough*, USA TODAY, Feb. 2, 1994, at 10D.

245. For example, a variety of pollsters have suggested a connection between the angry white male voter of 1994 and his resentment towards political correctness, but even

rise in public opposition to political correctness and a resulting shift in the courts against hate speech codes. While the latter is clear, the former is more indirect. We can trace a trend against PC among opinion leaders, but their opposition must be seen as either reflective of the public's mood or an antecedent influence. Alternatively, we might consider a change to the theory of judicial behavior. Perhaps courts respond to the views of opinion leaders and not simply the general public. I leave that question for another day.

However, we need not let these methodological challenges frustrate us, for there is better evidence that the Supreme Court's own opposition to PC motivated its rejection of hate speech rules. Reading the Court's decision in *R.A.V.*, and surveying the justices' comments since then, it seems likely that they were sending a signal about PC when they overturned St. Paul, Minnesota's hate crime statute. Further, when one considers that the judges in *Dambrot* and *Corry* based their decisions extensively on *R.A.V.*, the justices' opinions have had a much wider influence in distinguishing hate speech from sexual harassment.

In the *R.A.V.* decision, Justice Blackmun offered one of the most telling explanations for the majority's holding. Like the other three justices who concurred, Blackmun could not accept the majority's rationale for upholding sexual harassment litigation while overturning hate speech legislation. But unlike his brethren, Blackmun put the dilemma in plain terms. As he said:

[There] is the possibility that this case . . . will be regarded as an aberration—a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely that racial threats and verbal assaults are of greater harm than other fighting words. *I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over “politically correct speech” and “cultural diversity,” neither of which is presented here.* If this is the meaning of today's opinion, it is perhaps even more regrettable.²⁴⁶

here they cannot agree on what issues or themes comprise PC. See *Male Call at the Polls. Analysts Say Recent Elections Highlight Angry White Men's Power in Politics*, DALLAS MORNING NEWS, Dec. 28, 1994, at 1A.

246. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 415–16 (Blackmun, J., concurring) (emphasis added).

Blackmun is not the only person to suggest that the *R.A.V.* decision was directed against PC. The first commentators on the case offered a similar analysis. As the *St. Louis Post-Dispatch* reported, political correctness "never appeared in Justice Antonin Scalia's decision on Monday striking down a hate-speech law from St. Paul . . . [b]ut legal scholars said Tuesday that Scalia's opinion was clearly aimed at the proliferating state laws, municipal ordinances and campus codes aimed at racist, sexist and anti-Semitic speech."²⁴⁷ Added Steven Shapiro of the ACLU, "[t]his decision was clearly written in the larger political context in which the conservative wing of the court is concerned about the political correctness movement."²⁴⁸

As he had done through much of the PC debate, Charles Krauthammer jumped in to offer his own analysis. Explaining the decision, he said:

The St. Paul opinion represents yet another battle in [Justice] Scalia's continuing campaign against group rights. [When it comes to offering] members of preferred groups . . . special protection from verbal or symbolic injury, Scalia has long tried to deter the state from making these kinds of hierarchical distinctions among the citizenry. [Justice Blackmun charges] Scalia with using this case to attack "politically correct speech." Scalia's opinion will, no doubt, chill the current ardor on campus for politically correct speech codes. . . . Scalia has indeed taken aim at political correctness. He is to be commended for it.²⁴⁹

Understandably, one might question the impartiality of Krauthammer or the ACLU, since each had an interest in extending the Court's message beyond the four corners of *R.A.V.* Krauthammer had been crusading against PC for up to a year at the time of *R.A.V.*, and the ACLU had also represented the plaintiff in *Doe* and wanted to confirm that collegiate speech codes were now a dead letter. Nevertheless, scholars and observers on various sides of the spectrum all saw the *R.A.V.* decision as rooted in concerns about political correctness.

247. William H. Freivogel, *Ruling Aimed at Hate-Speech Laws*, ST. LOUIS POST-DISPATCH, June 24, 1992, at 1C.

248. Freivogel, *supra* note 247 at 1C.

249. Charles Krauthammer, *Political Correctness is Scalia's Newest Target*, CHI. SUN-TIMES, June 27, 1992, at 21.

Appearing on the MacNeil/Lehrer Newshour, Professors Charles Fried and Lawrence Tribe of Harvard Law School (two ideological opposites) both agreed that the *R.A.V.* decision was "going to have an effect on campuses which have passed these so-called 'politically correct restrictions.'" ²⁵⁰ Fried said that Scalia's opinion would affect the policies of places such as Stanford, Michigan, and Wisconsin, where "certain kinds of speech are banned because they upset people who belong to certain categories," ²⁵¹ but other equally offensive kinds of speech are not banned.

It is not at all surprising that the Court would premise its hate speech decision on concerns of PC. The lawyer who represented the plaintiff in *R.A.V.* chose an argument which made "the connection between [St. Paul's] ordinance and the attempts to frame 'politically correct' speech codes on college campuses." ²⁵² But he had more than a receptive court. Since the decision, individual justices have given hints of their concerns for political correctness. In speeches at major universities, both Chief Justice Rehnquist and Justice Thomas have decried the influence of PC. Addressing a commencement ceremony at George Mason University, Rehnquist alluded "to disputes on numerous college campuses over 'politically correct speech.'" ²⁵³ The Chief Justice continued, "[o]n occasion, one senses that [for] some universities today . . . there is an orthodoxy or sort of party line from which one departs at one's peril." ²⁵⁴ So, too, Justice Thomas has "complained that 'a new brand of stereotypes and ad hominem assaults are surfacing across the nation's college campuses, in the national media, in Hollywood and among the . . . "cultural elite"' aimed at 'those who dare to disagree with the latest ideological fad.'" ²⁵⁵

But it is Justice Scalia who reserves the most enmity for political correctness. As Krauthammer noted, the *R.A.V.* decision may have been part of Scalia's ongoing battle to chill the nation's ardor for political correctness. ²⁵⁶ Certainly, his dissents since then have hardly

250. *MacNeil/Lehrer Newshour* (PBS television broadcast, June 26, 1992).

251. *MacNeil/Lehrer Newshour* (PBS television broadcast, June 26, 1992).

252. Gary Jeffrey Jacobsohn, *In Defense of a Cross-Burner*, WASH. POST, Nov. 21, 1994, at C2 (reviewing EDWARD J. CLEARY, *BEYOND THE BURNING CROSS* (1994) (a book by the plaintiff's lawyer, Edward Cleary, in which he boasts of the arguments his team used to interest the Court)).

253. *Schools Must Test Ideas, Rehnquist Says*, L.A. TIMES, May 23, 1993 at A12.

254. *Schools Must Test Ideas, Rehnquist Says*, *supra* note 253, at A12.

255. Michael Kinsley, *Right-Wing P.C. Is Still P.C.*, TIME, Aug. 9, 1993 at 66.

256. See Krauthammer, *supra* note 249, at 21.

masked his disdain for PC. In a 1994 case holding that gender may not be a basis for jury selection, a "sarcastic Antonin Scalia . . . ridiculed the Court's majority for its political correctness. 'Unisex is unquestionably in fashion,'" he declared.²⁵⁷ Scalia's behavior did not escape other journalists. Even the *Washington Times* noted the mockery with which Scalia accused "the majority of politically correct 'anti-male-chauvinist oratory' and flawed reasoning."²⁵⁸ It is hardly a leap to imagine that his opinion of political correctness would have influenced his decision on the related issue of collegiate hate speech.

Moving back from the Supreme Court to the lower courts, there may be other issues besides political correctness that affected their decisions on speech codes. Again, we are aided by public law research, which posits that the personal attributes of individual judges influence their decisions.²⁵⁹ This is most applicable in the *Doe* case, where Judge Avern Cohn had been an attorney with the ACLU before joining the bench. In a law review article after the case, Judge Cohn even speaks of his

long association with the American Civil Liberties Union in the years before I took the bench. ACLU furnished counsel for the plaintiff in *Doe*. When I returned to Detroit in 1950 to begin practicing law I became a cooperating attorney with the ACLU and handled several matters for it in the 1960s [During that time], I received a good deal of publicity for a speech I made castigating the Michigan State Senate for attempting to financially punish universities because of a dislike of certain campus speakers. . . . If one believes in predestination, it is more than coincidence that *Doe v. The University of Michigan* ended up on my docket in May 1989.²⁶⁰

There are, of course, several ways to interpret Judge Cohn's writings. It could be, as he says, that "these antecedents" merely sensitized him "to the tensions on college campuses regarding First Amendment

257. *ABC News: Supreme Court Rules on Jury Gender Discrimination* (ABC television broadcast, Apr. 19, 1994).

258. Nancy E. Roman, *High Court Restricts Shaping Juries, Rules Sex Cannot be a Factor in Choices*, WASH. TIMES, Apr. 20, 1994, at A1.

259. See generally GOLDMAN & SARAT, *supra* note 223; SEGAL & SPAETH, *supra* note 199.

260. Avern Cohn, *Doe v. University of Michigan: A Somewhat Personal View*, 37 WAYNE L. REV. 1313, 1314 (1991).

matters.”²⁶¹ But it is also possible that Judge Cohn came to the case with a decision already in mind, that his own ideology predetermined the result, or that his past association with plaintiff’s counsel unfairly tilted the case against the university’s speech code.

Judge Cohn’s background raises one more point that merits consideration. One cannot ignore the fact that the judges making these decisions are not only white, but they attended college at a very different time than the period in which the speech codes were adopted. Most of the judges graduated college in the 1940s or 1950s, a period in which few minorities attended college, let alone felt free to fight harassment against them on campus (or elsewhere). Thirty years later, nearly seventeen percent of college students were non-white,²⁶² and minority students felt empowered to organize for their own interests. Affirmative action had succeeded in allowing more minority students to go to college, but it also created conflicts between affluent white students who came from homogenous schools and communities, and the more diverse student body they found on many college campuses.²⁶³ That minority students (or faculty) sought speech codes to protect themselves from “ethno-violence”²⁶⁴ might very well have been lost on a judiciary that came of age in a different time. This is not to say that older judges cannot grow with the times (witness Justice Blackmun), but one has to consider that the *Doe*, *UWM Post*, *Dambrot* and *Corry* courts were all setting legal rules for an educational environment that no longer existed.

C. Limiting Sexuality

A different theory turns the analytical tables in explaining the courts’ behavior. Under this approach *Doe* and its progeny are not the anomaly; instead sexual harassment law becomes the exception. The argument requires a few steps: because harassment cases generally turn on questions of sexuality, not gender, and given both Congress’ and

261. Cohn, *supra* note 260, at 1314.

262. See ALEXANDER ASTIN ET AL., THE AMERICAN FRESHMAN: NATIONAL NORMS FOR FALL 1998 47 (1998).

263. See Jon Wiener, *Reagan’s Children: Racial Hatred on Campus*, THE NATION, Feb. 27, 1989, at 260.

264. This term is borrowed from the Center for Applied Study of Ethnoviolence. It is an all-encompassing phrase, referring to violence against groups defined by race, gender, ethnicity, or sexual orientation.

the courts' initial reluctance to recognize discrimination claims, it may be that a relatively prudish judiciary has limited harassment law to ferreting out sexually oriented conduct in the workplace. Hate speech rules, thus, had no chance at judicial recognition since the harassment law on which they were based is limited largely to cases of sexual behavior or expression.

This hypothesis begins with the recognition that Title VII was passed almost by accident, and that the inclusion of "sex" as a protected basis was a strategic miscalculation by its opponents.²⁶⁵ Over time, the courts have extended Title VII to cover instances of sexual harassment, but even here many of the fact patterns seem to turn on questions of sex not gender. Lindemann and Kadue rightly note that "the essence of sexual harassment is gender discrimination," yet they also recognize that many courts have been misled by the federal regulations into believing that "the predicate acts underlying a sexual harassment claim must be sexual in nature."²⁶⁶ Some go even further. As Ruth Colker contends, "women who are presumed to be heterosexual . . . frequently prevail if can they show that they have been sexualized; merely showing gender-based but nonsexualized conduct . . . is usually not sufficient."²⁶⁷

Perhaps the courts should not be faulted for grounding sexual harassment on sexual, rather than gender-based conduct, as they have faced a number of outside commentators urging them to do just this. The EEOC's own test, for example, premises liability on "conduct of a sexual nature."²⁶⁸ Furthermore, a number of feminist theorists have justified the claim on its sexual nature. Catharine MacKinnon, for example, has argued that sexual harassment should be defined according to its "unwanted imposition of sexual requirements"²⁶⁹ But even with such urgings, the courts were not obliged to take outside advice. Why, then, would they choose to premise harassment claims on sexu-

265. One day before a House vote on the Civil Rights Act, proponents of Title VII amended the legislation to add "sex" as a protected basis. They did so with the help of Title VII's opponents, "who hoped that the inclusion of 'sex' would highlight the absurdity of the effort as a whole, and contribute to its defeat." Estrich, *supra* note 13, at 816-17.

266. LINDEMANN & KADUE, *supra* note 7, at 30, 173.

267. Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 YALE J.L. & FEMINISM 196-97 (1995).

268. SEXUAL HARASSMENT ON CAMPUS, *supra* note 52, at 137.

269. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979).

ality rather than gender (or even other bases)? Here, there are three possibilities. First, it may be that the courts reflect an American prudishness over sexuality. Many observers contend that America's sexual mores are more puritanical than those of other western societies. Notwithstanding the prevalence of movies and television programs with sexual themes, we are said to be less comfortable with personal sexuality and with public displays of sexuality. Certainly, the conservative campaigns over obscenity and pornography reflect a cultural willingness to restrain public sexuality,²⁷⁰ and the federal judiciary has also been drifting more conservatively over the last fifteen years.²⁷¹ Considering, then, that Title VII claims arise in the workplace, it may be that the courts have stepped in against sexual displays on the shop floor.²⁷²

At the same time, the courts' endorsement of sexual harassment law may reflect their attitudes towards women, and in particular the rise of women who work outside the home. This explanation finds its basis in social change of the 1970s as women began to enter the work force in greater numbers. But rather than being seen as equal colleagues, many women were greeted with a spate of harassment from their male coworkers. At this point, the courts had a choice to make: would they allow the men's conduct to continue, or would they step in to guarantee women equal opportunity in the workplace? Recent history tells us that the courts did endorse sexual harassment law, but their decisions do not necessarily mean that judges saw women as equals. Instead, the courts may have considered women as "the weaker

270. These drives, including especially Attorney General Edwin Meese's Task Force on Pornography, are to be contrasted with feminist campaigns like those of Catharine MacKinnon to eradicate pornography. While the former are driven by a moral revulsion to certain sexual behavior, the latter maintain that pornography and the like represent sexual servitude for women. *See generally* Catharine A. MacKinnon, *Pornography, Civil Rights & Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); FINAL REPORTS OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY (Rutledge Hill Press, 1986).

271. *See* EISENSTEIN, *supra* note 226, at 152.

272. Of course, we cannot ignore *American Booksellers v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985), where the Seventh Circuit refused to uphold an Indianapolis anti-pornography statute championed by Catharine MacKinnon and Andrea Dworkin. Although many would disagree, I explain this decision on two grounds. First, the court framed the case as feminist activists getting too "uppity," rather than a statute that protected "average" women. Second, instead of considering pornography a protected activity, the court left open the question of how dangerous the "secondary effects" of pornography might be. To the extent that social science research can show a more direct relationship between pornography and sex crimes, the Seventh Circuit might be willing to reconsider and uphold the statute.

sex," a class of workers who needed special protection. We have seen this approach before in the labor cases of the early twentieth century. As *Muller v. Oregon*²⁷³ and its progeny pronounced, women are more "delicate" than men and need to be protected from harm in the workplace.²⁷⁴ Admittedly, this is a strange sentiment to confront eighty years later, and many will undoubtedly question its explanatory power. But one need only read the feminist literature of the 1990s to see that it continues to thrive. Even among feminist activists, some accuse others of "asking to be protected from society. . . . [They are] just re-enforcing society's opinion that all women are victims and need protection."²⁷⁵ If certain women would think this themselves, the courts' concurrence should be plausible too.

Others paint an even more pessimistic picture of sexual harassment law. Susan Estrich describes a judiciary indifferent to women's claims and imbued with sexist notions of "normal" workplace behavior.²⁷⁶ As she says, "if there is one area of social behavior where sexism is entrenched in law—one realm where traditional male prerogatives are most protected, male power most jealously preserved, and female power most jealously limited—it is in the area of sex itself. . . ."²⁷⁷

But what if we take a slightly different approach to Estrich's explanation? Perhaps it's not so much that the courts were trying to preserve male sexual prerogatives as they were fearful of female power and consequently female sexuality. Catharine MacKinnon's work would seem to support this interpretation. Since she first appeared on the academic scene, MacKinnon has argued that women are socially defined in sexual terms. Sex and gender are similar concepts, she says, and an effort by society to limit one realm is the same as affecting the other.²⁷⁸ So, too, other feminist scholars have argued that society's fear of women's sexual independence was the impetus behind anti-women policies of the 1980s.²⁷⁹ Drawing on this work, we might consider whether the courts employed sexual restrictions under Title VII as a way of returning women to the "private sphere" of the home.

273. *Muller v. Oregon*, 208 U.S. 412 (1908).

274. See JUDITH A. BAER, *THE CHAINS OF PROTECTION* 66–67 (1978).

275. Estlund, *supra* note 8, at 717.

276. See Estrich, *supra* note 13, at 860.

277. Estrich, *supra* note 13, at 814–15.

278. See generally MACKINNON, *supra* note 269; Catharine MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *FEMINIST LEGAL THEORY* 81 (Katharine T. Bartlett & Roseanne Kennedy eds. 1991).

279. See, e.g., EISENSTEIN, *supra* note 226, at 152–90.

Surprisingly, this view finds support in the writings of Frederick Engels and John Stuart Mill nearly a century ago. Both describe a world in which women are defined by their sexuality and limited to the private space of the family home. According to Mill, men control women through sex. They define women as submissive sexual objects and force them into marriage by closing all doors against them. Men do this, Mill says, because they have a real antipathy to the equal freedom of women.²⁸⁰ Adds Engel, "the first condition of the liberation of the wife is to bring the whole female sex back into public industry."²⁸¹

Bringing their discussion forward to the present day, it is possible that the courts endorsed sexual harassment law as a way of pushing women back into the private sphere of home life. Granted, the sexual conduct they bridled was not that of women, but the courts may have equated such displays with the emergence of women in the work world. Sex had not previously been part of the workplace, and judges may have looked at women as the catalyst. In restricting sexual behavior at work, then, the courts may have been sending a message to women that they belonged back at home.

This view, of course, is hardly novel, as women have often faced the argument that their place is inside the home and not at work. But what is so interesting about the courts' adoption of sexual harassment law is that it came in the late 1970s to mid 1980s just as women were beginning to enter the workforce again in large numbers. The timing strikes me as more than coincidental and immediately draws connections to other times in this century when Congress and the courts adopted protective labor legislation as women took jobs.²⁸² Whether such rules were designed to protect women or prevent them from competing with men is still very much an open question, and I leave its consideration to the reader. Either way, however, the debate continues to highlight the relationship between women's sexuality and their legal treatment. As one commentator has said, "sexuality . . . is in part a social construction . . . The way we think about sex fashions the way we live it."²⁸³

280. See generally JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (Stefan Collini ed., Cambridge Univ. Press 1989).

281. FREDERICK ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 137-38 (Eleanor Burke Leacock ed., Int'l Publishers 1972).

282. See Baer, *supra* note 274.

283. EISENSTEIN, *supra* note 226, at 157 (citing JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS* 1985).

D. Gender Wins But Race Loses

Finally, a different theory looks at both the courts' and the public's varying preferences for gender and racial protection. Under this approach, sexual harassment law wins because it protects women, a group the courts and/or public consider worthy of legal defense. By contrast, hate speech codes lose because they are seen as racial preferences, which neither the courts nor public continue to support.

The hypothesis begins by distinguishing the motivations for protections against sexual harassment and collegiate hate speech. Explaining the former, we say that sexual harassment law developed to protect women against gender discrimination. This is a bit of a break from the previous theory, which presumes that harassment law turns on questions of sexuality, not gender. Regardless of which is correct, there can be no mistaking that sexual harassment law has been applied most often to protect women against male aggressors.²⁸⁴ This is an important point, since its statutory basis, Title VII, is not limited to women or sexual harassment. In fact, as argued earlier, Title VII does not even mention harassment. Harassment law is a judge-created claim, and with some notable exceptions, the doctrine is used most regularly by women who face discriminatory harassment from their male colleagues or supervisors.²⁸⁵

By contrast, hate speech codes developed out of concerns for a perceived increase in racial intolerance on college campuses. The judges who have heard these cases admit as much in their opinions. Judge Cohn, linked Michigan's rule to "a rising tide of racial intolerance and harassment on campus."²⁸⁶ His opinion recites a litany of racial incidents that took place on the Ann Arbor campus up to the adoption of the University's hate speech code.²⁸⁷ During the uproar,

284. See generally LINDEMANN & KADUE, *supra* note 7; MOREWITZ, *supra* note 23.

285. This is not to say that the law is limited to claims of sexual harassment, or even to cases of men harassing women. The doctrine did evolve from cases of racial harassment, and the law is still open to such claims. Moreover, several men are just beginning to bring reverse sexual harassment cases against their female superiors, and some employees are filing same-sex harassment claims against their gay or lesbian co-workers or supervisors. My point is not that harassment law must be limited to claims of men harassing women on the basis of sex, but rather that these represent the majority of claims brought and won over the last ten years.

286. *Doe v. University of Mich.*, 721 F. Supp. 852, 853 (E.D. Mich. 1989).

287. "Unknown persons distributed a flier declaring an 'open season' on blacks"; "a student disc jockey at an on-campus radio station allowed racist jokes to be broadcast";

"the United Coalition Against Racism, a campus anti-discrimination group, announced that it intended to file a class action civil rights suit against the University 'for not maintaining or creating a non-racist, non-violent atmosphere' on campus."²⁸⁸ It was this threat, as well as the racial incidents themselves, that Judge Cohn says convinced the University to adopt "a six-point action plan to remedy the racial problems on campus. This included the adoption of 'an anti-racial harassment policy,' " otherwise known as the university's hate speech rule.²⁸⁹

Similarly, Judge Warren's opinion in *UWM Post* describes a series of racial incidents that preceded Wisconsin's speech code. A fraternity erected a large caricature of a black Fiji Islander at a theme party; a fight occurred "with racial overtones between members of two fraternities"; and "a fraternity held a 'slave auction' at which pledges in black face performed skits parroting black entertainers."²⁹⁰ In response to "concerns over an increase in incidents of discriminatory harassment, . . . [the University's] Board of Regents adopted 'Design for Diversity,' a plan to increase minority representation, multi-cultural understanding and greater diversity throughout the University of Wisconsin System's 26 campuses."²⁹¹ As part of this Design, the Regents also adopted Rule 17.06(2), popularly known as the University's hate speech rule.²⁹²

Michigan and Wisconsin are not anomalies. An academic study has found that ten of the twenty largest American universities developed speech codes during 1986 to 1991, and the vast majority of these followed racial incidents that occurred on campus.²⁹³ The incidents themselves were highly symbolic, with all but a few of the most notorious involving attacks by white students against their black peers. As such, they became representative of the larger problems faced by black students and faculty. At many schools black students organized to fight what they considered a hostile racial climate on their campuses. The Universities of Massachusetts-Amherst and Michigan, for example,

and "a Ku Klux Klan uniform was displayed from a dormitory window . . . [a]t a demonstration protesting these incidents." *Doe* 721 F. Supp. at 854.

288. *Doe*, 721 F. Supp. at 854.

289. *Doe*, 721 F. Supp. at 853-55.

290. *UWM Post v. Board of Regents*, 774 F. Supp. 1163, 1165 (E.D. Wis. 1991).

291. *UWM Post*, 774 F. Supp. at 1165.

292. See *UWM Post*, 774 F. Supp. at 1165.

293. See *Academic Index*, *supra* note 18, at 137.

were besieged by student activists who took over campus buildings until they wrangled concessions on student recruitment, faculty diversity and multi-cultural programming. For their part, many university administrators were concerned at the rise in racial incidents. Apart from the adverse publicity the incidents generated, administrators were presiding over a period of decreasing black enrollment, declining black faculty, and receding national support for affirmative action and civil rights. The incidents meant that administrators had to do something, and if only to quiet campus, they were willing to act. Wisconsin's Design for Diversity was only the most prominent university response, most of which were directed to the problems of black students and faculty. Hate speech codes were a part of these administrative rules.²⁹⁴

Up to this point, I have suggested that sexual harassment law developed as a doctrine to protect women; I have also speculated that hate speech codes were initiated as a way of defending black students and faculty. Put more simply, we might say that sexual harassment is about gender protection, while hate speech rules are about racial protection. Seen this way, it is easier to surmise why judges would support the former but reject the latter. Not only have the courts shown a greater willingness of late to enforce gender protection, but a majority of Americans still believe that civil rights laws are required for women's equality.²⁹⁵ Conversely, the courts have turned away from racial claims, while fewer Americans believe that blacks continue to merit the same level of civil rights protection they currently receive.²⁹⁶

I recognize this is tricky ground. I am not suggesting that the courts, or the American public, have traded sexism for racism. One cannot, however, ignore changes in the American approach to race and gender, both in law and public attitudes. Where black litigants regularly won constitutional rights thirty years ago, it is now women who do better before the Supreme Court.²⁹⁷ Similarly, where majorities of Americans used to think that blacks had it worse than women, new

294. See Jon Gould, *Symbolic Speech: Legal Mobilization and the Rise of Collegiate Hate Speech Codes* (dissertation slated for upcoming publication by UMI Dissertation Services).

295. See Diana Collasanto, *Public Wants Civil Rights Widened for Some Groups, Not for Others*, GALLOP POLL MONTHLY, Dec. 1989, at 15.

296. See C. Gray Wheeler, *30 Years Beyond "I Have a Dream,"* GALLOP POLL MONTHLY, Oct. 1993, at 2.

297. See *infra* text accompanying notes 105–109.

polling shows greater support of gender over racial protections.²⁹⁸ Given such changes, we cannot ignore the possibility that either sexual harassment law or collegiate speech codes were interpreted through the same rubric.

One way to understand this dichotomy is through the idea of "legal discourses." This term comes from the work of Michael McCann and refers to the way in which legal claims are introduced into public debate through varying narratives.²⁹⁹ Over time, these narratives take on a life of their own, to the point that we then categorize the original claims under different areas of the law. For example, sexual harassment claims arose originally in the workplace, depicting cases of crude male supervisors touching, hassling or making sexual demands on their female employees. The common theme of these cases was sexual abuse of women, and that narrative influenced the courts to categorize sexual harassment under the larger tort of sex discrimination. By contrast, the first reports of hate speech codes linked their adoption to the increasing power of left-wing academics and their plans to rewrite First Amendment doctrine. Rather than focusing on the "rise of racial violence" to which the codes were targeted, many news reports suggested that "these scholars" and the hate speech policies they advocate "go[] against the American grain" on free speech.³⁰⁰ This narrative carried over to the courts' treatment of collegiate hate policies, where each court to consider the codes categorized them under the First Amendment and not Title VII. Unlike women, whose interests the courts were willing to protect, minorities were seen as over-stepping the Constitution or asking for special treatment with collegiate hate speech codes.

The same theme can be seen in the courts' treatment of race and gender. In their book, *The Supreme Court, Race and Civil Rights*, Abraham Davis and Barbara Luck Graham chronicle the Supreme Court's treatment of race cases this century.³⁰¹ Like others who follow the Court, Davis and Graham depict varying alliances of justices who are sympathetic and responsive to the condition of black Americans.

298. See National Election Studies, Center for Political Studies, Univ. Mich. *The NES Guide to Public Opinion and Electoral Behavior* (last modified Feb. 17, 1999) <http://www.umich.edu/~nes/nesguide/toptables/tab4b_4.htm> [hereinafter NES].

299. See generally MICHAEL W. MCCANN, *RIGHTS AT WORK* (1994).

300. Tamar Jacoby, *Time to Outlaw Racial Slurs?*, NEWSWEEK, June 6, 1988, at 59.

301. ABRAHAM L. DAVIS & BARBARA LUCK GRAHAM, *THE SUPREME COURT, RACE AND CIVIL RIGHTS* (1995).

However, once the calendar moves to the mid-1980s, some chinks are seen in the Court's support for civil rights cases. In *City of Richmond v. J.A. Croson Co.*, the Court struck down a minority set-aside program.³⁰² In *Wygant v. Jackson Board of Education*, the Court invalidated an affirmative action plan which protected black teachers over more senior white instructors.³⁰³ And in *Wards Cove Packing Co. v. Atonio*, the Court shifted the burden of proof from employer to employee in discrimination suits.³⁰⁴ Similarly, in the area of voting rights, the Court has been less supportive of black litigants. In *Johnson v. DeGrandy*, the Court rejected a dilution suit from black and Hispanic voters,³⁰⁵ and over the last two years the Court has thrown out redistricting that tried to strengthen the representation of black voters.³⁰⁶

At the same time, the Court has been more supportive, or at least neutral, on issues of women's rights. Beginning with the Burger Court, justices "demonstrated a willingness to void any legislative gender discrimination that (in the eyes of the Court) is not designed to compensate women for disadvantages that they have suffered as a result of societal discrimination. . . ."³⁰⁷ This is not to suggest that the Court has embraced women's rights, for, as some commentators have noted, the Rehnquist Court's treatment of abortion shows a greater willingness to restrict a woman's right to choose.³⁰⁸ Further, in *Price Waterhouse v. Hopkins*, the Court went to unusual lengths to find an acceptable "business reason" for a woman's demotion.³⁰⁹ Still, even if the Court is not an enthusiastic supporter of gender rights, it is hardly the critic that now haunts race cases. The Court has extended Title VII to cover cases of sexual harassment, and more recently the justices held that a criminal statute could be applied to a judge who was convicted of assaulting and harassing female litigants.³¹⁰

302. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

303. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

304. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

305. *Johnson v. DeGrandy*, 512 U.S. 997 (1994).

306. See *Abrams v. Johnson*, Nos. 95-1425, 95-1460, 1997 U.S. LEXIS 3863 (Jun. 19, 1997); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996).

307. Leslie Friedman Goldstein, *Sex and the Burger Court: Recent Judicial Policy Making Toward Women*, in RACE, SEX AND POLICY PROBLEMS 103, 107 (Marian Lief Palley & Michael Preston eds., 1979).

308. See EISENSTEIN, *supra* note 226, at 152.

309. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

310. See *United States v. Lanier*, 520 U.S. 259 (1997).

Part of the reason for the Court's deference to women's rights must go to the presence of Justices Sandra Day O'Connor and Ruth Bader Ginsburg on the bench. Before becoming a judge, Justice Ginsburg made a career bringing cases of sex discrimination, and her background shines through in *United States v. Virginia* (VMI), where her opinion overturned the all-male program of the Virginia Military Institute.³¹¹ The VMI case is also significant for the constitutional test the Court used to consider sex discrimination. Traditionally, the Court has employed a "strict scrutiny" test to consider racial classifications and an "intermediate scrutiny" test to examine gender classifications under the Equal Protection Clause of the Fourteenth Amendment.³¹² In VMI, however, the Court invented a new test for gender classifications that closely resembles the strict scrutiny test of race. Said the Court, Virginia must show an "exceedingly persuasive justification" to uphold its single-sex policy of military education.³¹³ It is especially relevant that the Court applied this test to a case where the state discriminated *against* gender; by fashioning a new test so similar to strict scrutiny, the state's policy is less likely to stand than under the traditional test of intermediate scrutiny.

By contrast, in the case of affirmative action, where the government discriminates *in favor* of race or gender, the strict scrutiny standard makes it more likely that gender and racial preferences will be found unconstitutional. This distinction makes *Adarand v. Peña* all the more important, because the Supreme Court ruled there that strict scrutiny applies to affirmative action for blacks and other racial minorities.³¹⁴ There are many commentators who believe that *Adarand* places gender-based affirmative action in peril,³¹⁵ but as others point out, the Court left open the question of the proper constitutional standard for gender.³¹⁶ In the meantime, the lower courts continue to

311. See *United States v. Virginia*, 518 U.S. 515 (1996).

312. Under strict scrutiny, the state must show that the use of the suspect classification furthers a compelling governmental purpose. See, e.g., *University of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (Powell, J., plurality opinion). By contrast, under intermediate scrutiny, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).

313. *VMI*, 518 U.S. at 534.

314. See *Adarand v. Peña*, 515 U.S. 200 (1995).

315. See, e.g., Bryant S. Delgadillo, *Do "Skepticism," "Consistency," and "Congruence" Foreshadow a Color-Blind Future?*, 69 *TEMPLE L.R.* 1521 (1996).

316. See, e.g., Rebecca L. Berkeley, *Gender Based Affirmative Action: A Journey That Has Only Just Begun*, 50 *WASH. U. J. URB. & CONTEMP. L.* 353 (1996).

use the intermediate test for gender-based affirmative action,³¹⁷ making its practice easier to uphold than that for racial minorities.

It is difficult to say what has influenced the courts' progression on race and gender cases. Some commentators have focused on the personal politics of new judges, suggesting that the conservative appointments of Presidents Reagan and Bush have pushed the courts to more conservative positions on race cases.³¹⁸ It is also possible, as mentioned earlier, that the addition of two female justices has sensitized the Supreme Court, and by extension the lower courts, to questions of gender discrimination. We also, however, ought to look outside the Court to other influences, for public opinion has turned upside down on questions of racial or gender preferences.

To most lawyers and traditional legal scholars, the notion that public opinion influences legal doctrine is anathema. Courts are supposed to be insulated from the general public and immune from political pressures. As a number of political scientists have shown, however, judicial "policy responds dynamically to public opinion change."³¹⁹ Known as dynamic representation theory, this approach shows that, rather than being isolated from the majority's preferences, courts "seem to float on the tide of fashions."³²⁰ Research varies on whether the courts' response is an immediate, direct, or indirect result of public opinion or whether there is a delay in the public opinion's effect on the courts, but all agree that public opinion is an important predictor of judicial decisions.³²¹

For this Article I am most interested in American attitudes towards civil rights and whether they influenced the various cases. I begin with the common conclusion that "America has generally moved in a liberal direction" since World War II.³²² By "liberal," researchers generally mean that Americans have become more tolerant, "with

317. See Berkeley, *supra* note 316, at 354.

318. See, e.g., EISENSTEIN, *supra* note 226, at 152, 160-62.

319. James A. Stimson et al., *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 543 (1995).

320. Stimson, et al., *supra* note 319, at 558.

321. See William Mishler and Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 96 (1993); William Mishler & Reginald S. Sheehan, *Response: Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 716 (1994); Helmut Norpoth & Jeffrey A. Segal, *Comment: Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994); Stimson et al., *supra* note 319, at 558-60.

322. SMITH, *supra* note 199, at 479.

equal rights and individualism [experiencing] the most consistent liberal movements."³²³ Even James Davis, one of the luminaries of public opinion research, concludes that the "overall trend is more liberal than conservative."³²⁴

An overall trend, however, does not tell us the respective differences in attitudes to women and racial minorities, particularly when the liberal trend has co-existed with "a period of profound change to the Right in virtually every area of public policy."³²⁵ I do not pretend to explain the oddity of competing liberal and conservative trends, as scholars more deft than I have been confounded by this "disquieting disjuncture."³²⁶ Nevertheless, it is possible that surveyors have been confusing attitudes towards tolerance with those towards equality. This is a crucial distinction, since the former measures one's willingness to passively accept another, while the latter asks what costs the respondent would endure to make another whole.³²⁷ Put another way, a respondent can answer that he is tolerant ("yes, I would accept a black neighbor"), without necessarily favoring equality ("no, I am unwilling to fund programs for minorities"). In fact, a prominent national poll has found that while racial attitudes have changed for the better, the shift has not been accompanied by a change in opinion about the state of racial equality.³²⁸

According to the Gallup Organization, Americans are "more racially tolerant now than in the recent past."³²⁹ For example, only five percent of whites in a 1990 survey said they would move out of their neighborhood if a black family moved next door.³³⁰ This number is

323. SMITH, *supra* note 199, at 479.

324. James A. Davis, *Changeable Weather in a Cooling Climate Atop the Liberal Plateau: Conversion and Replacement in Forty-Two General Social Survey Items 1972-1989*, 56 PUB. OPINION Q. 261, 261 (1992).

325. Cliff Zukin, *Comment on Davis: Yes, But . . . Public Opinion Is a Top-Down Process*, 56 PUB. OPINION Q. 311, 312 (1992).

326. See Zukin, *supra* note 325, at 313.

327. I recognize that the surveys do not literally ask these questions. My point is what the answers to each question reflect about the respondents' true attitudes. Tolerance, by definition, is a passive activity. However, equality requires that something be affirmatively given to the suppressed to make them equal. It may be rights, money, education, or another form of "opportunity," but equality implies that the "haves" will make some effort to assist the "have nots."

328. See George Gallup, Jr. & Larry Hugick, *Racial Tolerance Grows, Progress on Racial Equality Less Evident*, GALLUP POLL MONTHLY, June 1990, at 23.

329. Gallup & Hugick, *supra* note 328, at 23.

330. See Gallup & Hugick, *supra* note 328, at 24.

down forty percent from a similar question administered in 1963.³³¹ Americans are no farther along, however, in creating racial equality. Nearly two-thirds of Americans believe that racial equality has been achieved, but that number has been static since 1978.³³² More importantly, many Americans, particularly white Americans, have declared the civil rights crusade complete and express little willingness to address the problems faced by black Americans. The Gallup Poll's numbers show as much. Despite evidence to the contrary,³³³ "[l]arge majorities [of Americans] think blacks now have the same opportunities as whites in . . . obtaining jobs, housing and education. . . ."³³⁴ As a result, almost two-thirds of whites oppose new civil rights laws "to reduce discrimination against blacks."³³⁵ Seventy-seven percent of whites think "blacks overestimate the amount of discrimination in America,"³³⁶ and black people top the list of groups for whom "there has been too much attention" given to civil rights.³³⁷

The opposite is true for women. Between 1975 and 1989 there was an increase of seventeen percent in the number of Americans who say that men hold more privileges than women.³³⁸ Today, seventy-three percent of couples say men earn more than women, and a significant majority of Americans believe that women do not "have equal job opportunities with men."³³⁹ It is not surprising, then, that only twenty-nine percent of Americans think there has been too much attention paid to the civil rights of women.³⁴⁰

The Gallup poll's findings are born out in the scholarly results of the National Election Study (NES). Just as Gallup found fewer Ameri-

331. See Gallup & Hugick, *supra* note 328, at 24.

332. See Gallup & Hugick, *supra* note 328, at 24, 28.

333. See generally WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* (1987).

334. Colasanto, *supra* note 295, at 13.

335. Wheeler, *supra* note 296, at 2.

336. Wheeler, *supra* note 296, at 2.

337. Colasanto, *supra* note 295, at 15.

338. In 1975, 32% of respondents said men had more privileges, 28% said women had more, and 31% said men and women had equal privileges. By 1989, 49% thought that men had more privileges, 22% said women had more, and 21% said men and women had equal privileges. See Linda DeStefano & Diane Colasanto, *Unlike 1975, Today Most Americans Think Men Have It Better*, GALLUP POLL MONTHLY, Feb. 1990, at 25, 25.

339. Again, these numbers should be contrasted with those from 1975. In 1975, respondents were equally split at 48%. Today, 42% percent of Americans "feel that women in this country have equal job opportunities with men." 56% disagree. DeStefano & Colasanto, *supra* note 338, at 27.

340. See Colasanto, *supra* note 295, at 15.

cans favoring new civil rights laws for blacks, the NES saw a significant drop between 1984 and 1994 in the percentage of Americans who believe that "the government in Washington should make every possible effort to improve the social and economic position of blacks."³⁴¹ In addition, the number of Americans who believe that "the government should not make any special effort to help minorities because they should help themselves" jumped from thirty-three percent to fifty percent.³⁴² However, attitudes towards women's rights were tracking the opposite direction. Between 1972 and 1994, the percentage of Americans who oppose an "equal role" for women "in running business, industry and government" dropped from twenty-nine percent to twelve percent.³⁴³

To say that public opinion has changed contemporaneously with the associated legal doctrine is not, of course, the same thing as saying that one caused the other. We know that courts are responsive to the political and social climates in which they work,³⁴⁴ but in some sense this is a chicken-and-egg question. Do courts lead social change, or do changing social attitudes influence the courts? This is undoubtedly a contentious question among scholars.³⁴⁵ Still, I think there is good evidence to suggest that the courts were following public opinion in upholding sexual harassment law and overturning hate speech codes. Both the sexual harassment and hate speech decisions came shortly after the respective changes in public opinion, and at least in the case of speech codes, the courts were egged on by a series of editorials in major newspapers and magazines. Averaging one every five days,³⁴⁶ it is inconceivable to think that judges could have avoided the turn in elite opinion, where over eighty percent of the editorials opposed the adoption of hate speech codes.³⁴⁷ Even Justice Kennedy has acknowledged that judges follow current trends.³⁴⁸ As one of his former clerks explains, Kennedy "constantly refer[s] to how [a decision is] going to be

341. NES, *supra* note 298.

342. NES, *supra* note 298.

343. NES, *supra* note 298 (illustrating how the courts have interpreted the First Amendment in response to political and social climates).

344. See generally Kloppenberg, *supra* note 242.

345. See, e.g., ROSENBERG, *supra* note 200; SCHUBERT, *supra* note 243.

346. Running a search on Nexis, I found 364 editorials over a five-year period beginning in 1989.

347. A content analysis of the same editorials provides this information.

348. See Jeffrey Rosen, *Annals of Law: The Agonizer*, NEW YORKER, Nov. 11, 1996, at 82, 86.

perceived, how the papers are going to do it, how it's going to look."³⁴⁹ Again, this is not the same as statistical proof, but with an institution that is reluctant to acknowledge majoritarian influences, this connection alone should raise eyebrows. Perhaps it is time to reconsider the courts' treatment of sexual harassment law and collegiate speech codes. To the courts, just as it was to the public, sexual harassment law may have represented necessary protection for women, while hate speech codes became synonymous with "special rights" that minorities no longer required.

CONCLUSION

As I have said from the beginning, the point of this Article is not to argue that any one of the alternative theories *must* explain the courts' disparate treatment between sexual harassment and hate speech. Rather, I am suggesting that we need to reexamine the assumed distinction between HWE claims for sexual harassment and collegiate hate speech codes. I do not have an agenda here. I am not advocating that we weaken sexual harassment law or that we reenact campus speech codes. My role is that of critical observer. I hope that the reader will take three essential points away from the Article. First, the courts have treated similar claims differently. As drafted, the collegiate hate speech codes were virtually identical to Title VII's sexual harassment law, yet the courts have upheld sexual harassment claims while ruling hate speech codes unconstitutional. Second, the explanations proffered by the courts, as well as other traditional legal rationales, do not adequately explain the courts' different treatment.

Finally, while several bases may seem conceivable, there is still the nagging sense that the courts are not telling us something about their real reasons. As a result, I think we need to step back and ask whether there are other explanations for the courts' behavior. I have essentially proposed a "political" explanation, suggesting that a variety of cultural and social factors influenced the courts to create and reject various legal rights. In particular, I have argued that the courts' attitudes toward gender and racial protection governed these cases. I may be wrong. After all, this Article takes a new approach. However, we cannot ignore the fact that the courts have created two separate approaches for claims

349. Rosen, *supra* note 348, at 86.

that should have been treated similarly. It is not enough to say that sexual harassment law is constitutional and hate speech is not. The question is why, and the courts have yet to provide us a justifiable answer. ♣